SUPREME COURT, U. S.

No. 1141

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In the

Supreme Court of the United States

OCTOBER TERM, 1967.

CITY OF NEW YORK, CITY OF BOSTON, CITY OF CHICAGO, CITY OF SAN FRANCISCO, and CITY OF SAN DIEGO; STATES OF HAWAII, INDIANA, ILLINOIS, MASSACHUSETTS, OHIO, OREGON, TEXAS, WASHINGTON, WEST VIRGINIA and WISCONSIN,

Appellants,

vs.

UNITED STATES OF AMERICA, HARPER AND ROW PUBLISHERS, INC., THE BOBBS-MERRILL COMPANY, INC., CHILDRENS PRESS, INC., THOMAS Y. CROWELL COMPANY, DODD, MEAD & COMPANY, INC., E. P. DUTTON & COMPANY, INC., GOLDEN PRESS, INC., GROSSET AND DUNLAP, INC., HOLT, RINEHART & WINSTON, INC., LITTLE, BROWN & COMPANY, INC., THE MACMILLAN COMPANY, WILLIAM MORROW & COMPANY, INC., G. P. PUTNAM'S SONS, RANDOM HOUSE, INC., CHARLES SCRIBNER'S SONS, THE VIKING PRESS, INC., HENRY Z. WALCK, INC. and FRANKLIN WATTS INC.,

Respondents.

On Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
Hon. ABRAHAM L. MAROVITZ, District Judge.

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

This single jurisdictional statement covers appeals by ten states and their political subdivisions and by five cities[1] in eighteen closely related cases. The questions involved are identical.

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[1] The States of Hawaii, Indiana, Illinois, Massachusetts, Ohio, Oregon, Texas, Washington, West Virginia, Wisconsin and the Cities of Boston, Chicago, New York, San Diego and San Francisco. A separate appeal has been noticed and a jurisdictional statement filed by the following applicants denied intervention in these same cases: The States of Alaska and Michigan; the Cities of Los Angeles, Madison Heights, Philadelphia, Rochester and Tampa; the Boards of Education of East Orange, Linden, Newark, Passaic, and Rahway; the School Districts of Downington Area, Madison and Philadelphia and the Board of Public Instruction of Dade County (Fla.).

OPINIONS BELOW

The court below delivered no opinions.

GROUNDS FOR JURISDICTION

Nature of proceedings

The United States brought the eighteen cases under Section 4 of the Sherman Act, 15 U.S.C. § 4, to enjoin violations of Section 1 of the Act, 15 U.S.C. § 1.

Before trial the defendants and the Antitrust Division of the Department of Justice filed proposed consent judgments for approval and entry by the court below. Appellants made timely applications to intervene under Rule 24 of the F. R. Civ. Proc. to oppose entry of the proposed judgments. Intervention was denied and, with minor modifications, the judgments were entered as proposed.

Timeliness of appeal

The judgments below were entered November 27, 1967. Notices of appeal were filed January 23, 1968 in the court below, the United States District Court for the Northern District of Illinois.

Jurisdiction

Jurisdiction of these direct appeals from the district court is conferred on this Court by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U.S.C. § 29, as amended. Cases sustaining jurisdiction include *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129 (1967) and *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683 (1961).

QUESTIONS PRESENTED

1. In civil antitrust cases brought by the United States, do consent judgments which include no admissions of the violations charged, or provisions of comparable import, adequately promote the objectives of the antitrust laws where the violations consist of (a) price-fixing (b) on sales to State and local governments (c) which used federal grants in part to make affected purchases?

2. When such consent judgments are presented to a district court for approval and entry, should the court grant timely applications by State and local governments to intervene under Rule 24(a) of the Federal Rules of Civil Procedure to oppose entry of the judgments?

3. If the district court denies intervention of right, is the court required nonetheless to permit intervention as a matter of discretion under Rule 24(b)?

STATEMENT OF THE CASE

In late 1965 the Antitrust Division of the Department of Justice started an investigation of suspected price-fixing in the sale of children's books. The inquiry was continued before a grand jury impanelled by the court below, documents were subpoenaed, and testimony was heard. No indictments were returned by the grand jury.

These eighteen civil suits were filed on April 18, 1967. Each named a book publisher as defendant and charged a price-fixing conspiracy between the publisher and its wholesale distributors[2] in the sale of library editions of

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[2] Wholesalers were charged with participation in the conspiracy as unnamed co-conspirators. Included as appendices are: Appendix A, the federal civil complaint in The Bobbs-Merrill Company, Inc., 67 C 613 which is typical of all eighteen complaints filed. Appendix B, the order of the court below entered on November 27, 1967, denying petitions to intervene, and Appendix C, the Final Judgment of the court below entered on November 27, 1967 implementing the stipulated consent decree of the parties. The Final Judgment reproduced is identical in all 18 cases.

children's books.[3] The complaint alleged that most of the purchases of such books were made by governmental units with public funds from local, State and Federal sources.

Consent decree negotiations between the defendant publishers and the Antitrust Division apparently started immediately. Upon learning of them, counsel for appellants sought to persuade the Antitrust Division to accept consent decrees only if they contained a limited admission of violation or a so-called "asphalt clause."[4] By such a

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[3] Such books are defined in the complaints at paragraphs 3 and 4 as:

> "... books designed for use by children of elementary and secondary school age ... in reinforced bindings sold primarily to schools and libraries, or ... which have a 'net price.'"

[4] This sobriquet derives from several Government antitrust cases involving sales to State and local governments of road paving materials. *United States* v. *Lake Asphalt and Petroleum Co. of Massachusetts,* (D.C. Mass. 1960) 1960 CCH Trade Cas. Par. 69, 835; *United States* v. *Bituminous Concrete Assn., Inc.,* (D.C. Mass, 1960) 1960 CCH Trade Cas. Par. 69, 878; *United States* v. *Allied Chemical Corp.,* (D.C. Mass. 1960) 1961 CCH Trade Cas. Par. 69, 923. The following is a representative sample of the pertinent part of such a provision excerpted from the decree in the *Allied Chemical* case, *supra*:

> "That on the basis of said limited admission the defendants signatory hereto have engaged in an unlawful combination and conspiracy in violation of Section 1 of the Sherman Act as charged in the said complaint, this adjudication being for the sole purpose of establishing the *prima facie* effect of this Final Judgment, in the suits specified below, and for no other purpose;
>
> "Each defendant is enjoined and restrained from denying that this Final Judgment has such *prima facie* effect in any such suit; provided, however, that this section shall not be deemed to prohibit any such defendant from rebutting such *prima facie* evidence or from asserting any defense with respect to damages or other defenses available to it."
>
> [Thereafter follows a description of the advantaged cases.]

clause injured governmental bodies suing to recoup their damages would have the benefit of *prima facie* evidence of the antitrust violation—just as they would following trials won by the United States pursuant to §5(a) of the Clayton Act, 15 U.S.C. § 16(a).[5]

Instead, the Antitrust Division on October 23, 1967, joined defendants in filing proposed judgments which recited that they constituted no adjudication or admission of antitrust violations. Accompanying stipulations provided that the judgments could be entered in thirty days unless the Government withdrew its consent. Within the 30 day period appellants applied for leave to intervene to oppose entry of the decrees.

Appellants pointed out that they had all been large-scale purchasers of the books in question for their educational systems and libraries. All alleged that they had filed, or intended to file, treble-damage actions against the defendants.

Appellants' principal objection to the decrees was that they did not contain an "asphalt clause" or similar provision giving governmental bodies the benefit of *prima facie* proof of the violation. Without such a provision, in appel-

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[5] "Sec. 5(a) A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by . . . the United States under the antitrust laws to the effect that a defendant has violated said laws shall be *prima facie* evidence against such defendant in any action . . . brought by any other party against such defendant under said laws . . . as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: Provided, that this section shall not apply to consent judgments or decrees entered before any testimony has been taken. . . ."

lants' view, the decrees neither assisted States and local units of government to obtain redress nor operated to deter others from indulging in price fixing to public bodies.

Appellants also sought certain other changes in the decrees, including clauses requiring defendants to make a) trade editions of children's books and b) sheets for prebinders, reasonably available for purchase by public bodies which might not want the more expensive library editions of certain works.

The district court heard oral argument on November 13 and 15, 1967 and on November 27, 1967, denied intervention. Treating appellants as *amici curiae*, the court rejected their arguments for an "asphalt clause" and for clauses making available trade editions and sheets for prebinders. On the same day with certain minor revisions he entered the consent judgments originally proposed.

At appellants' request the court also impounded all documents obtained by the Government in the grand jury investigation, subject to further orders by the chief judge. The Government did not oppose this request.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

1. Do the consent decrees adequately promote the objectives of the antitrust laws?

(a) General

The bedrock of the Antitrust Division's argument in the court below was that the only responsibility for which it could be held accountable was to obtain a decree stopping particular defendants from continuing the specific anti-competitive practices charged. Promotion of other antitrust objectives would be fringe benefits for the public which the Division need not insist on if so-called practical considerations made it inconvenient or onerous for the Division to obtain them.

Appellants believe the Division's responsibilities are much broader. In their view, once the Division has determined that a business situation calls for putting into motion the full panoply of Government antitrust machinery, it can properly accept only a decree which advances overall enforcement policy. This view is enforced by the particular nature of the antitrust violations here charged; namely, hard-core price-fixing arrangements directed against governmental agencies.

The questions argued subsequently herein are individually substantial and merit plenary consideration by the Court. But the philosophically divergent views set forth above are of even greater substance. They require resolution by this Court and guidance to the Antitrust Division and the district courts.

The same is true of a related question inherent in these cases: the extent to which the judiciary should override administrative determinations of the Antitrust Division. Some deference must of course be shown to the enforcement agency's experience and judgment. Yet the very requirement of court review and approval is a recognition that administrators can misconceive their duties, generally and in particular cases. The Division is subject to pressures which are not always consistent with the long-range public interest. Individual officials are understandably desirous of making a record of accomplishment during short terms of office. The Division must justify its own budget to Congressional committees. Both objectives have traditionally been served by reference to the number of cases handled and the won-and-lost record established. In addition, the Division, no less than other busy litigants intent on settling cases, is subject to the human temptation to gloss over the disadvantages of settlement and magnify the difficulties of trial. But district courts at present have

no standards, short of demonstrable malfeasance, to guide them in determining which decrees unduly reflect such pressures or even serious errors of judgment.

Last year in *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129 (1967), this Court unmistakably signaled district courts to scrutinize consent decrees more carefully and apply stricter standards than had been their wont. The Antitrust Division, however, would have that case considered as *sui generis*. *El Paso*, we are told, is applicable only to those fortuitous cases in which a consent decree has been preceded by trial, Government victory on appeal, and a mandate by this Court on the proper form of relief. The *El Paso* consent decree, however, would have been just as contrary to the public interest if there had been no earlier trial and appeal. But until this Court speaks further, such a reading will have a subtle attraction for many a district court. See, Opinion *United States* v. *First National Bank and Trust Co. of Lexington*, (D.C. E.D. Ky., December 29, 1967), 1967 Trade Cas., Para. 72.180.

Appellants' objections to the decrees in these cases are two-fold: (i) they fail affirmatively to assist injured State and local governments to recoup public funds taken by the defendants in conspiratorial price-fixed overcharges and ii) they fail affirmatively to deter price-fixing by other businesses selling goods or services to State and local governments.[5a] The considerations advanced by the Antitrust Division to justify such failures, while not frivolous, are unsubstantial in comparison.

[5a] In addition, by failing to require defendants to make available trade editions and prebinder sheets, the decrees fail to strike down a major way in which price fixing of library editions was exploited.

(b) Failure to assist State and local government damage claimants.

By enacting Section 4 of the Clayton Act to authorize treble-damage actions, Congress included a special and unusual feature to tighten and supplement the enforcement machinery of the Sherman Act. Time and again in different contexts the Court has emphasized that intent and has recognized private treble damage actions as the most effective means of antitrust enforcement. See, *e.g.*, *Leh* v. *General Petroleum Corp.*, 382 U.S. 54 (1965); *Minnesota Mining & Mfg. Co.* v. *New Jersey Wood Finishing Co.*, 381 U.S. 311 (1965).

Absent truly compelling countervailing considerations, it would seem incumbent on the Executive's chief enforcement agency to assist in every way to make this enforcement weapon effective by facilitating the recovery of damages, for unless damages can in fact be recovered, the weapon is impotent.

In these cases the decrees recite that they constitute no adjudication or admission of any issue, including of course, the issue of antitrust violations. In fact it is customary in this type of antitrust consent judgment for defendants thereafter to earnestly proclaim their complete innocence of any claimed violation. Thus, persons injured are left to their own devices to prove from scratch the very violations already investigated and alleged by the Antitrust Division. Experience shows that even with aggressive use of pretrial discovery this is an expensive, time-consuming task and one beset with many difficulties, especially against determined defendants with deep pockets.

Here there are added reasons for affirmative assistance to damage claimants. By definition, the price-fixed product, library editions of children's books, is sold only to public or quasi-public bodies. And in fact the Government

complaints themselves allege that the principal purchasers are State and local governments. Appellants' damage claims are to redress injuries to their educational systems and ultimately their taxpayers, not to corporate stockholders. Concern for intergovernmental cooperation within the federal system, if nothing more, should prompt the Antitrust Division to exert special efforts to help such appellants.

Furthermore, substantial federal funds have also gone into appellants' purchases of these books through grants under the Elementary and Secondary Act of 1965, 20 U.S.C. § 821. It would be problematical, however, whether the part of such grants which went toward the purchase of library editions could be accurately determined; it is therefore unlikely as a practical matter whether such federal funds could be recovered except as part of the damages in suits by State and local governments. But upon successful conclusion of such suits, the United States might itself be entitled to participate in the recovery. That was the thrust of a recent ruling of the Comptroller General with reference to a State's recovery of damages for price-fixing of road repair material bought by the State with a combination of federal and state monies (Opinion of the Comp. Genl. B-162539, 1967 Trade Cas., Para. 72.250). Thus, vindication of the federal interest would also seem to call for special Antitrust Division assistance to appellants.

In asking the Antitrust Division and the court below to reject the decrees because they did not include an "asphalt clause," appellants were merely stating the clear appropriateness in these cases of an enforcement technique which the Antitrust Division had itself devised and temporarily made an integral part of enforcement policy but a few years ago. The technique was abandoned, apparently, only because it encountered, as might have been

expected, opposition from defendants and a single adverse district court decision. See *United States* v. *Brunswick-Balke-Collender Company*, 203 F. Supp. 657 (E.D. Wis., 1962). A few years later in *United States* v. *Ward Baking Co.*, 376 U.S. 327 (1964), this Court strongly implied that if defendants did not accept a consent decree because of Government insistence on an asphalt or other clause, their recourse lay only in going to trial on the merits, not in compelling Government acceptance of a "consent" decree to which it had not consented. Thus, the "asphalt clause" would now seem to be fully appropriate in the right cases.

(c) Failure to deter price-fixing.

With the antitrust laws, as with any other laws proscribing types of behavior, deterrence should be the primary objective of enforcement. Section 4 of the Sherman Act, under which the Government suits were brought, itself imposes on the Attorney General the duty to "prevent" as well as to restrain violations; and the same section uses the same language in conferring jurisdiction on the district courts.

Price fixing is a hard-core violation. Vertical price-fixing conspiracies such as are involved in these cases have been outlawed for nearly sixty years.[6] More than forty years ago this Court declared all collusive price fixing to be so inherently unreasonable that evidence of business justification was not even admissible.[7] Since then the Antitrust Division has brought and won, mostly by consent decrees, hundreds of price-fixing cases. Yet less than two years

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[6] *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U.S. 373 (1911).

[7] *United States* v. *Trenton Potteries Co.*, 273 U.S. 392 (1927).

ago the chief of the Antitrust Division testified that the "great majority" of his Division's cases were still based on price fixing.[8]

The House Antitrust Subcommittee after investigation raised serious questions as to the value of the consent judgment program as an effective instrument of antitrust policy. The subcommittee determined that:

> "In addition to the compromise of adequate relief, consent settlements of antitrust cases result in a substantial lessening, if not the virtual elimination, of the deterrent effect the antitrust laws have on business operations." (Report of Subcom. No. 5, House Judiciary Committee, 86th Cong. January 30, 1959. "Consent Decree Program of the Department of Justice.")

The conclusion is inescapable that enforcement policy in price-fixing cases, in terms of achieving deterrence, has been a failure. Why? It is at least arguable that the blame lies in consent decrees of the type agreed to in the instant cases. So long as the Antitrust Division is satisfied with slap-on-the-wrist, sin-no-more, decrees, price-fixing apparently involves only acceptable businessman's risks. Unless it is done crudely, it promises profits which outweigh the possible costs of litigation and the chance that a handful of persistent damage claimants may be successful.[9]

An "asphalt clause" in consent decrees would be no cure-all. The *prima facie* case it would provide could still be

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[8] Testimony of Donald F. Turner, Ass't. Atty. Gen., Antitrust Div., before the Senate Subcomm. on Antitrust and Monopoly Hearings on S.2512, July 15, 1966, Hearings Tr. p. 95.

[9] In practice, even where such claimants have the benefit of a *prima facie* case on the violation issue, the road to recovery is long.

rebutted. But it would be a long step toward facilitating redress for injured State and local governments. Especially as its use became established Antitrust Division policy, it would tend toward taking the profit out of price fixing or, to put it differently, raising the ante for would-be price fixers.

With the volume of State and local government purchases of goods and services increasing every year, a change in the Division's policy seems imperative. Since it will not be made on the Division's own initiative, judicial intervention by way of a directive from this Court is essential in the public interest.

(d) The Antitrust Division's "countervailing considerations".

In correspondence with appellants and in the court below, the Division acknowledged some validity in appellants' arguments, but said that the many other considerations which went into enforcement policy outweighed them. What these many considerations boiled down to was this: defendants simply will not accept decrees with an "asphalt clause";[10] therefore insistence on such a clause would only result in full-scale trials, eighteen of them in the case of children's books; that would cause undue diversion of the Division's resources from more important matters. That eighteen full trials would be necessary in children's books is a questionable assumption.

This argument implies that the only reason defendants agree to consent decrees is to avoid giving damage claimants the *prima facie* case they would enjoy after a Government victory in trial. As any litigant knows, there are

[10] In the court below, this statement was supported by an assertion that the Division had asked defendants if they would accept such a clause and defendants had answered "no."

other substantial advantages to settling cases. Be that as it may, it is no doubt true that defendants would be less likely to settle if they had to accept "asphalt clauses"—particularly until insistence upon such clauses became established policy and defendants knew the Antitrust Division meant business. However, the short answer to the argument is that some added litigation would be a small price to pay for achieving real deterrence of price fixing.

Furthermore, from the standpoint of the judiciary, consent decrees which leave the question of violation open may well increase the total burden on the courts. For it will then have to be litigated in many courts by a host of damage claimants who must duplicate the exhaustive investigation and discovery the Antitrust Division has already made. It would be interesting to have comments on the Division's argument from the Coordinating Committee on Multiple Litigation of the Federal Judiciary.

The Division also relies on Congressional intent when Section 5 of the Clayton Act was last amended. Congress wanted to make the standard form of consent decree more palatable to defendants, we are told. No doubt it did, in cases where such decrees were appropriate. But that is a far cry from a legislative mandate that the Division subordinate other enforcement considerations and grant such decrees indiscriminately.

2. Appellants have a right to intervene.

Intervention as of right must be considered from July 1, 1966, the effective date of the amended Fed.R.Civ.P. Rule 24(a).[11] The amendment broadened and liberalized interventions of right by removing restrictions encountered under the old intervention rule which had been construed to require what amounted to a showing of *res judicata* effect or property in the custody of the court and subject to its disposition.

Under the amended Rule 24(a)(2) the right to intervene exists if an appellant can show (i) an interest relating to the transaction which is the subject of the action, (ii) that disposition of the action may as a practical matter impair or impede his ability to protect that interest, and (iii) that he is not adequately represented by existing parties. It is clear that appellants meet all three of these requirements. The question is substantial since in the administration of the antitrust laws, intervention provides the only effective means of presenting objections to the terms of a consent decree.

(a) Appellants have an interest relating to the transactions.

Appellants are state, city and public agencies that were substantial purchasers of library editions of children's

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[11] Rule 24(a) provides in pertinent part:

"Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

books. They are typical of the classes of public purchasers that were injured. The alleged price-fixing conspiracy caused higher prices to be established for library editions of children's books and limited the availability of trade editions and prebinder sheets, thus eroding educational programs, diverting tax funds and directly injuring the public. In consequence, appellants have a direct and immediate interest in protecting and promoting a competitive market in this field and with respect to sales generally to public agencies. In addition, appellants have already filed, or have indicated their intention to file, treble damage antitrust suits to recover damages for the alleged overcharges. As such the disposition of the federal proceeding agreed to by the parties without a determination or admission of violation is of vital concern and substantial interest to appellants.

Intervention in a government antitrust suit was recently allowed by this Court in *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129 (1967), a Section 7 Clayton Act case. There in a 1964 decision this Court found that El Paso and Pacific Northwest Pipeline had been illegally merged and returned the case to the district court with directions "to order divestiture without delay" (*United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651, 662 (1964).) A consent decree was then negotiated which in the view of many did not comply with the plan of divestiture envisioned by this Court or with the requirements of the antitrust laws.

California, where El Paso sold most of its gas, was one of the interests that sought to intervene under the old Rule 24(a) in opposition to the consent judgment and to assure that Pacific Northwest would be restored as an effective competitor. The denial of intervention was reversed by this Court, quoting with approval from *Missouri-*

Kansas Pipe Line Co. v. *United States,* 312 U.S. 502, 506, as follows:

> "'. . . where the enforcement of a public law also demands distinct safeguarding of private interests by giving them a formal status in the decree, the power to enforce rights thus sanctioned is not left to the public authorities nor put in the keeping of the district court's discretion.'"

This Court found that California had an "interest" in the "transaction which is the subject of the action" which would be "adversely affected" as provided in the old Rule 24(a).

The Court held it was

> California's "interests, as part of the public interest in a competitive system, that our mandate was designed to protect." (386 U.S. at 135)

Finally, it was determined that the existing parties had fallen "far short" of representing the interest of the intervenors, in that the "United States knuckled under to El Paso and settled this litigation." (386 U.S. at 136 and 141).

This decision rendered under old Rule 24(a) and in the face of this Court's recognition in that decision of the "new version of Rule 24(a)" as quite apparently liberalizing interventions of right, clearly establishes that the denial of intervention of right was improper and in error. Briefly:

(1) Appellants represent public agencies, state and local, who were victimized by the alleged price-fixing conspiracy. In *El Paso,* California was a public agency.

(2) A hard core offense, namely, price-fixing, is involved which directly affects the public in the payment

of taxes. In *El Paso* the offense would tend to affect utility rates paid by the public.

(3) Public policy as expressed by Congress and this Court seeks federal aid and assistance to injured public bodies in their pursuit of treble damage actions as the most effective means of antitrust enforcement. Appellants have a direct interest in facilitating damage recoveries which interest is adversely affected by the district court's acceptance of the innocuous consent judgment.

(4) The public interest is decidedly involved and seriously prejudiced by the consent judgment entered.

It will no doubt be argued that this Court's recent affirmance without opinion in *United States* v. *Blue Chip Stamp Co.*, 1967 Trade Cas., Para. 72,337 (Jan. 15, 1968) supports the present denial of intervention. It seems reasonable to infer that the affirmance was based on the obvious lack of timeliness of the applications to intervene. On the merits of intervention the facts of the case are distinguishable and the *dicta* by the district court on this question appears to be erroneous. Even in *Blue Chip* the district court in discussing the interest a petitioner for intervention must show said:

> "If petitioners are appearing merely as members of the public, in the public interest, then it is incumbent upon them to establish that the Government has not acted properly in the public interest." (1967 Trade Cas., p. 84,506.)

Appellants, of course, are not "merely members of the public," but are themselves duly constituted representatives of the public entrusted to protect its interest. The acceptance of these decrees by the Antitrust Division deprives appellants of the statutory benefits of an adjudicated decision or admission in favor of the Government.

The result is that the bargain struck with the defendants by the Antitrust Division works against the interest of appellants. This draws into question whether the advantages to the public of quick settlement of these cases outweigh the benefits of the *prima facie* evidence rule obtainable either by negotiations or Government victories in the main cases. Appellants urge that determination of this question should not be left to the Antitrust Division.

Both the Government and the defendants argued below that *Commonwealth Edison Co.* v. *Allis Chalmers Manufacturing Co.*, 315 F. 2d 564 (C.A. 7th 1963) was apposite on the issue of the nature of the interest required to intervene. In that case Illinois attempted to intervene as agent or *parens patriae* of the people of Illinois who purchased electricity in a private antitrust damage action brought by a utility against manufacturers of heavy electrical equipment. The decision denying intervention was based on the lack of standing of consumers to sue for damages because of causal remoteness. Illinois, of course, could have no better standing than its purported principals.

When the opinion is read in the light of the amended Rule however it does offer support for intervention where it states:

> "The primary essential element that must exist for an applicant to intervene in a pending action as of right under Rule 24(a) Fed. R. Civ. P. is that he have a direct personal or pecuniary interest in the subject of the litigation; . . ." P. 566.

Appellants have a pecuniary interest in the damage actions they have filed and this interest stems from the transactions which are the subject of the Government suits.

(b) Appellants' ability to protect their interest may be impaired or impeded.

It is obvious, as matters presently stand, that appellants have little if anything to gain from the Government cases. Settlement of the cases by consent decrees before hearings will interdict the possibility of appellants obtaining § 5(a) Clayton Act benefits. Their applications to intervene having been denied, appellants have no standing to appeal from the decrees. Appellants' situation is best described by Professor Benjamin Kaplan, Reporter to the Advisory Committee on Civil Rules, 1960-1966, and now a member of that Committee, when he wrote:[12]

> "New rule 24(a)(2) invites us to see that the practical consequence to the applicants of being denied intervention is that they cannot stop a settlement nor, if dissatisfied with the decree entered after contest, press their contentions on appeal; they are remitted, instead, to subsequent independent private actions in which it would be hard (although not impossible) to induce the courts to grant them better relief than was accorded by the settlement."

He then advises:

> "This factor can weigh for intervention; it is a matter for consideration from case to case."

No doubt appellants can bring their own independent actions—most have done so already. The issue is whether the denial of intervention and the consequent entry of these decrees may as a practical matter impair or impede their ability to protect their interest in those actions. It is plain that the amended rule was intended to allow practical considerations to play a role in the court's determination of when intervention of right should be grant-

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[12] Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. 356, 405 (1967).

ed. The elimination of the requirement of a *res judicata* effect from the Rule permits the court to evaluate the merits of intervention, not in absolute terms of whether applicant can get his day in court sometime and somewhere, but whether his exclusion will create practical impediments which will detract from his position when he undertakes to protect his interest—and as discussed above where the intervenor's interest is a public one, applicants are entitled to a higher standard of consideration than the ordinary private damage litigant.

(c) Appellants' interest is not adequately represented by the existing parties.

Appellants have filed treble-damage actions against the defendants in separate suits based on the same violations alleged in the Government actions. Patently these defendants would not qualify to adequately represent appellants' interest in those actions. This leaves the Antitrust Division as the only existing party which could do so.

The Antitrust Divison in deciding whether to accept consent decrees or to litigate, considers factors which do not bear upon the interests of intervenors.[13] In fact, this agency has opposed appellants' motions to intervene on policy grounds as it does all such motions.[14] The Antitrust Division has disagreed with appellants about the nature and extent of the relief which the decrees should provide. In the hearing below on November 13, 1967, counsel for the Government stated that although governmental agencies had a special duty, and even an obligation, to sue for

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[13] See The Supreme Court, 1966 Term, 81 Harv. L. Rev. 69, 223-224 (1967).

[14] Letter from Donald F. Turner, Ass't. Atty. Gen., Antitrust Div., to Emanuel Celler, Chairman, House Judiciary Comm., March 17, 1967, in BNA Antitrust & Trade Reg. Rep., March 21, 1967, at X-1.

damages in situations where they are the victims of antitrust violations, they deserved no preferential consideration by the Antitrust Division over the small businessman injured in his private enterprise by such violations (Pltf. Resp. pp. 82 and 83). This lack of concern for the interest of appellants by the Antitrust Division leaves them without a friend in these actions.[15]

Why the Antitrust Division opposes intervention, and is unwilling to stand squarely on its decrees being in the public interest, is not clear. Possibly it has an unarticulated fear that an order allowing intervention would be a precedent for intervention by all damage claimants for all purposes and at all stages of Government antitrust cases. Any such fear is unwarranted. The requirements of 24(a)(2) can, and probably should, be analyzed and applied in the context of both i) the stage of a case at which intervention is sought—here when a stipulation for a consent decree is being permitted to lay over for 30 days presumably to elicit comments and objections—and ii) the public purpose and public objectives for which intervention is sought. In the instant cases intervention is not sought during trial or to participate in trial. Moreover, as noted by the Advisory Committee when Rule 24 was amended:

> "An intervention . . . may be subject to appropriate conditions or restrictions responsive among other things to the requirements of efficient conduct of the proceedings." 39 F.R.D. 69, 111.

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[15] *Atlantis Development Corp. Ltd.* v. *United States*, 379 F. 2d 818, 825 (5th Cir. 1967).

3. The court below abused its discretion in not granting applicants permissive intervention.

Under all the circumstances brought to the Court's attention, it seems inconceivable that discretionary intervention was not granted. Rule 24(b) of the Federal Rules of Civil Procedure provides in pertinent part:

> Permissive Intervention. "Upon timely application anyone may be permitted to intervene in an action: . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

Appellants' claims and the main actions involve common questions of fact and law. The claims are actually based on the violations charged in the main cases. It is then only necessary to determine whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties. Such a determination necessarily requires weighing the importance of the issues in the case against any substantial deprivation caused to the parties to the main action by the introduction of additional litigants. This evaluation leads to the conclusion in the present cases that the involved public interest considerations merited a full hearing despite the delay or inconvenience appellant's intervention may cause. Antitrust suits are imbued with a public interest. The effects of violations can be pervasively debilitating to the economy, and as is alleged in these cases, may be a drain on public resources. Because of the extensive influence antitrust suits can exert, it is important to proper enforcement of the antitrust laws that a full hearing be given to those directly affected by violations. This is especially true, where the

cases are to be terminated by consent decrees, originally negotiated in private between the Antitrust Division and defendants.

Liberal intervention is in line with the modern trend reflected in the recent rule changes aimed at disposing of as much controversy between as many parties as possible consistent with due process. See *Atlantis Development Corporation* v. *United States*, 379 F. 2d 818, 825 (5th Cir. 1967).

If the parties directly affected by an antitrust violation, such as appellants here, are denied effective participation in the promulgation of relief, they have no guarantee that the Department of Justice will not settle for substantially less than what is required for effective enforcement of the antitrust laws and the development of effective deterrents. Appellants urge that when they, representing tens of millions of citizens, can be benefited or adversely affected by a course of action available to the Federal Government in a case directly affecting their pecuniary interest they are entitled to be given standing in that action.

There is ample precedent for this Court to review the discretion exercised by a court below: *Sutphen Estates* v. *United States*, 342 U.S. 19 (1951); *Allen Calculators, Inc.* v. *National Cash Register Co.*, 322 U.S. 137 (1944).

The claim of injury to appellants here is neither speculative nor contingent on unknown factors. The impact of the violations on States and local governments as charged in the Government complaints was immediate and certain. For this reason the court below should have allowed intervention to appellants so as to assure that all phases

of the public interest here involved—the restoration of effective competition, the fulfillment of the government's obligation to enforce the antitrust laws by results that will operate as deterrents, the framing of a decree that will make alternative trade editions and prebinder sheets available, and the restitution of public funds—are accounted for in the terms and conditions under which these Government actions are terminated.

CONCLUSION

The questions here in issue are of the utmost importance to the governments of Cities, States and their local subdivisions in facilitating damage recoveries for tortious antitrust violations committed by their vendors and in deterring further similar intrusions on their public treasuries. Probable jurisdiction should therefore be noted.

Respectfully submitted,

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APPENDIX A.

UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

UNITED STATES OF AMERICA, *Plaintiff*, v. THE BOBBS-MERRILL COMPANY, INC., *Defendant*.	CIVIL ACTION No. 67 C 613 Equitable Relief Sought Filed April 18, 1967

COMPLAINT

The United States of America, by its attorneys, brings this action against the above-named defendant and alleges as follows:

I.

JURISDICTION AND VENUE

1. This complaint is filed under Section 4 of the Act of Congress of July 2, 1890, as amended (15 U.S.C. § 4), commonly known as the Sherman Act, in order to prevent and restrain continuing violations by the defendant, as hereinafter alleged, of Section 1 of that Act (15 U.S.C. § 1).

2. Defendant The Bobbs-Merrill Company, Inc. transacts business within the Northern District of Illinois.

II.

DEFINITIONS

3. The term "children's books" shall mean "juveniles" as generally understood in the publishing industry, referring to books designed for use by children of elementary and secondary school age.

4. "Library editions" shall mean children's books in reinforced bindings sold primarily to schools and libraries, or children's books which have a "net price."

5. The term "wholesaler" shall mean any person or company which buys library editions of children's books from publishers and resells them to schools, libraries, governmental bodies, or bookstores.

III.

THE DEFENDANT

6. The Bobbs-Merrill Company, Inc. (hereinafter referred to as "Bobbs") is hereby made a defendant herein. Bobbs is a corporation organized and existing under the laws of the State of Indiana with its principal place of business in Indianapolis, Indiana. During the period of time covered by this complaint, Bobbs engaged in the production and sale of library editions of children's books throughout the United States.

IV.

THE CO-CONSPIRATORS

7. Various companies and persons not made defendants herein participated as co-conspirators with the defendant in the combination and conspiracy charged herein and performed acts and made statements in furtherance of said

offense. Said co-conspirators include numerous wholesalers located throughout the United States.

V.

NATURE OF TRADE AND COMMERCE

8. Schools, libraries, and governmental bodies purchase over $100,000,000 worth of children's books per year of which library editions comprise sales of approximately $40,000,000. This represents the major part of the total sales of children's books in the United States. Most of these purchases are made with public funds expended by State and local governments and by the Federal Government. Substantial amounts of federal funds are made available to State and local governments for the purchase of children's books.

9. Schools, libraries, and governmental bodies purchase children's books from wholesalers and directly from publishers including defendant Bobbs; wholesalers and publishers solicit many of the same customers in their efforts to sell children's books.

10. Traditionally, schools, libraries, and governmental bodies have benefited from competition among wholesalers and publishers in the granting of discounts on purchases of children's books. Many schools, libraries, and governmental bodies buy children's books by means of competitive bids.

11. In recent years, publishers and wholesalers have classified certain children's books as "library editions" and have sold such books, withut discount, at uniform "net prices" to schools and libraries.

12. Defendant Bobbs has produced library editions and has established "net prices" on these editions. It sales of Bobbs library editions in 1965 exceeded $100,000.

13. During the period of time covered by this complaint, defendant Bobbs sold and shipped substantial quantities of library editions of children's books in interstate commerce to customers located in States other than the States from which said children's books were shipped.

VI.

OFFENSES CHARGED

14. Beginning at least as early as 1960, the exact date being to the plaintiff unknown, and continuing thereafter until the date of the filing of this complaint, the defendant and co-conspirators engaged in an unlawful combination and conspiracy in restraint of the aforesaid interstate trade and commerce in library editions of children's books in violation of Section 1 of the Sherman Act, as amended (15 U.S.C. § 1).

15. The aforesaid combination and conspiracy consists of a continuing agreement, understanding, and concert of action among the defendant and the co-conspirators to fix, maintain, and stabilize prices on Bobbs library editions.

16. During the period of time covered by this complaint, the defendant has entered into a series of contracts in restraint of the aforesaid interstate trade and commerce in library editions of children's books in violation of Section 1 of the Sherman Act, as amended (15 U.S.C. § 1).

17. The aforesaid contracts consist of agreements between the defendant and each of the co-conspirators to fix, maintain, and stabilize prices on Bobbs library editions.

18. Pursuant to and in effectuation of the aforesaid combination and conspiracy, and the aforesaid contracts,

the defendant and co-conspirators did those things which, as hereinbefore alleged, they agreed to do. Said offenses will continue unless the relief hereinafter prayed for is granted.

VII.

EFFECTS

19. The aforesaid combination and conspiracy and the aforesaid contracts have had, among others, the following effects:

(a) Prices of Bobbs library editions have been fixed, maintained, and stabilized at high, artificial, and noncompetitive levels;

(b) Price competition between defendant and the co-conspirators, and price competition among the co-conspirators, in the sale of Bobbs library editions has been suppressed and eliminated; and

(c) Schools, libraries, and governmental bodies have been deprived of the benefits of competitive bids and discounts in the sale of Bobbs library editions.

PRAYER

Wherefore, plaintiff prays:

(A) That the Court adjudge and decree that the defendant and co-conspirators have unreasonably restrained the aforesaid interstate trade and commerce in children's books, as hereinbefore alleged, in violation of Section 1 of the Sherman Act.

(B) That the defendant, its successors, assignees, and transferees, and the officers, directors, agents, and employees thereof, and all other persons acting or claiming

to act on behalf thereof, be perpetually enjoined and restrained from, in any manner, directly or indirectly, continuing, maintaining, or renewing the aforesaid offenses and from engaging in any other combination, conspiracy, contract, agreement, understanding, or concert of action having a similar purpose or effect, and from adopting or following any practice, plan, program, or device having a similar purpose or effect.

(C) That defendant, its officers, directors, agents, and employees, and its successors, assignees, and transferees, and all persons acting or claiming to act on behalf thereof, be perpetually enjoined from:

(1) Using the terms "net" or "net price" in connection with any catalogue, price list, circular, or other announcement concerning its books;

(2) Suggesting prices at which its books are to be resold by any purchaser thereof;

(3) Refusing to sell, or delaying shipments, or misdirecting shipments or discriminating in any way, or threatening to refuse to sell or delay shipments or misdirect shipments or discriminate in any way against any purchaser of its books because of the prices at which said purchaser resells or offers to resell defendant's books; and

(4) Restricting, limiting or preventing or attempting to restrict, limit or prevent any person from selling or offering to sell any books at any price, or upon any terms or conditions as such person may individually determine.

(D) That defendant, its officers, directors, agents, and employees, and its successors, assignees, and transferees, and all persons acting or claiming to act on behalf thereof, be ordered to notify in writing (1) all of its wholesaler customers that they may resell its books at any price they may choose and (2) all of the schools, libraries, and governmental bodies whom defendant solicited during the past four years that defendant does not in any way attempt to restrict or limit any person from selling or offering to sell its books at any price, or upon any terms or conditions as such person may individually determine.

(E) That the Court order defendant to annex to every sealed bid or quotation on books a written certification by an officer of defendant, or by the official of defendant having authority to determine the bid or quotation involved, that said bid or quotation was not the result of any agreement, understanding, or communication between the defendant and any publisher, wholesaler, or other competitor.

(F) That defendant be enjoined from quoting published or "list" prices, or any other price mathematically determinable by its competitors from the pattern of prices previously quoted by defendant, in sealed bids covering books to federal, state, or local governmental bodies, or to schools or libraries, where the value of books to be purchased pursuant to such bid exceeds $100,000.

(G) That the plaintiff have such other and further relief as the nature of the case may require and the Court may deem just and proper.

(H) That the plaintiff recover the costs of this action.

Dated: April 18, 1967.

/s/ Ramsey Clark
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Attorney General

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DONALD F. TURNER
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/s/ Gordon Spivack
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APPENDIX B.

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

UNITED STATES OF AMERICA, *Plaintiff*, v. HARPER & ROW PUBLISHERS, INC., et al., *Defendants.*	No. 67 C 612 and Related Cases 67 C 613 through 67 C 629

ORDER

Whereas, on October 23, 1967 the parties to each of the above cases filed a stipulation consenting to the entry of a final judgment therein in the form attached to the stipulation, at any time after the expiration of 30 days following that date, provided that plaintiff could withdraw its consent at any time within the period of 30 days, and

Whereas, the period of 30 days has expired and plaintiff has not withdrawn its consent, and

Whereas, subsequent to the filing of the stipulations various applications for leave to intervene in the above cases, and supplements and amendments thereto, were filed by the States of Illinois, West Virginia, Massachusetts, Michigan, Texas, Wisconsin, Hawaii, Oregon, Washington, Alaska, Indiana and Ohio, and the Cities of Chicago, San Francisco, San Diego, Boston, New York, Baltimore, Rochester, Madison Heights, Los Angeles,

Tampa, and Philadelphia, and the Boards of Education of the Cities of Chicago, Passaic, Newark, and East Orange, and the School District of Philadelphia, Downingtown Area School District, Rahway Board of Education, Madison School District, Board of Public Instruction of Dade County, and Linden Board of Education, which applications seek *inter alia* modifications in the form of final judgment and preservation of, and access to, certain documents in the custody of John E. Sarbaugh, Chief of the Midwest Office of the Antitrust Division of the Department of Justice; and

Whereas, thereafter memoranda of law were filed by the applicants for intervention in support of their applications, and by plaintiff and by defendants in response and opposition to the applications, and

Whereas, on November 13, 1967 the above cases came on for hearing on the applications for intervention; the Court heard oral argument by counsel for the applicants, for plaintiff, and for the defendants; additional modifications in the form of final judgment were orally proposed by counsel for the applicants, some of which were later submitted in writing as part of the applications for intervention; and the Court instructed counsel for plaintiff, defendants and the applicants to meet and discuss the proposed additional modifications as to whether there was any justification for including them in the form of final judgment; and

Whereas, thereafter said counsel did meet between and among themselves, on at least five separate occasions for that purpose, and

Whereas, on November 16, 1967 the above cases again came on for hearing on the applications for intervention; the Court heard further oral argument and discussion by

counsel for the applicants, for plaintiff, and for the defendants with respect to the proposed additional modifications in the form of final judgment; counsel for the applicants withdrew certain of the additional modifications they had proposed; and the Court recommended to counsel for plaintiff and the defendants that Section X of the form of final judgment be modified by additional language; and

Whereas, in accordance with the Court's recommendation plaintiff and defendants have this date orally stipulated in open Court to modify Section X of the form of final judgment so as to include as an additional paragraph at the end thereof the following:

> "Any such information evidencing a violation of this Final Judgment which adversely affects the interest of any State or local governmental agency or instrumentality shall be retained by plaintiff for a period of one (1) year from the time when it is obtained and shall be treated as impounded subject to further order of this Court which, on motion and notice to the parties and a showing of good cause by the principal law officer of any State or local governmental agency or instrumentality, may order disclosure to such officer of any part or all of such information as the Court deems proper for use by such agency or instrumentality preliminary to or in connection with an action under the federal antitrust laws."

and

Whereas, in consequence of the applications for intervention and the hearings held thereon, the Court on November 20, 1967 entered an order impounding in the custody of John E. Sarbaugh, Chief of the Midwest Office of the Antitrust Division, United States Department of Justice, certain documents then in his custody, and

Whereas, after permitting all applicants for intervention to be fully heard as amici curiae, the Court has considered all of the written and oral arguments and matters presented to it, and is duly advised in the premises,

The Court Hereby Finds:

1. That none of the applicants for intervention has an interest relating to the property or transaction which is the subject matter of the above cases, within the meaning of subsection (a)(2) of Rule 24 of the Federal Rules of Civil Procedure.

2. That none of the applicants for intervention is so situated that the disposition of the cases may as a practical matter impair or impede its ability to protect such an interest, even if it exists, within the meaning of that subsection of that Rule.

3. That such an interest, even if it exists, is adequately represented by plaintiff herein within the meaning of that subsection of that Rule.

4. That granting to the applicants leave to intervene would unduly delay and prejudice the adjudication of the rights of plaintiff and the defendants within the meaning of Rule 24(b) of the Federal Rules of Civil Procedure.

The Court Hereby Concludes:

1. That none of the applicants for intervention is entitled to intervention of right under Rule 24(a) of the Federal Rules Civil Procedure.

2. That none of the applicants for intervention is entitled to permissive intervention under Rule 24(b) of such Rules.

IT IS THEREFORE HEREBY ORDERED that all applications for intervention filed in the above cases are denied.

Enter:
/s/ A. L. Marovitz
Judge

Dated: November 27, 1967

APPENDIX C.

UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

UNITED STATES OF AMERICA,
Plaintiff,
v.
HARPER & ROW, PUBLISHERS, INC.
Defendant.

CIVIL ACTION
No. 67 C 612

At Chicago, Illinois, in said Division and District on November 27, 1967.

FINAL JUDGMENT

Plaintiff, United States of America, having filed its complaint herein on April 18, 1967, and defendant having filed its answer thereto denying the substantive allegations thereof, and plaintiff and defendant by their respective attorneys having consented to the making and entry of this Final Judgment without admission by either party in respect to any issue;

Now, Therefore, before any testimony has been taken herein, without trial or adjudication of any issue of fact or law herein, and upon consent of the parties hereto, it is hereby, Ordered, Adjudged and Decreed as follows:

I.

This Court has jurisdiction of the subject matter of this action and of the parties hereto. The complaint states claims for relief against the defendant under Section 1 of the Act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, as amended.

II.

As used herein:

(A) "Defendant" means the defendant Harper & Row, Publishers, Inc., a corporation organized and existing under the laws of Illinois, and each of its domestic subsidiaries and each of its foreign subsidiaries when doing business through or with any reseller in the United States;

(B) "Person" means any individual, corporation, partnership, firm or other legal entity and includes wherever applicable any Federal, State or local or other governmental agency or instrumentality thereof;

(C) "Customer" means any school, library or governmental agency or instrumentality thereof;

(D) "Reseller" means any person who is engaged in the business of buying books for resale and includes any such person when acting as an agent or consignee of defendant; and

(E) Solely for purposes of Section VII(A) and (B), the term "any person engaged in the resale of books purchased from defendant" shall not be deemed to include the national distributor of paperbacks who functions as defendant's sole national distributor.

III.

The provisions of this Final Judgment applicable to the defendant shall also apply to each of its officers, directors, agents and employees and to each of its successors and assigns, and to all other persons in active concert or participation with any of them who receive notice of this Final Judgment by personal service or otherwise. This Final Judgment shall not apply to sales for use outside the United States, except for sales to or for the use of the plaintiff or any instrumentaliy or agency thereof.

IV.

Defendant is ordered and directed:

(A) Within ninety (90) days after entry of this Final Judgment, to mail a copy thereof to each of its currently active wholesale accounts which sells to customers; for a period of five (5) years after such entry to mail a copy to each such additional wholesale account to whom it sells books; and to maintain for such five (5) year period a complete list of all such wholesale accounts to whom defendant has so mailed copies;

(B) To issue a written statement to the effect that this Final Judgment prohibits the defendant from fixing, determining, dictating, approving or disapproving the customers to whom or the prices at which any reseller may sell or advertise defendant's books to any school, library or governmental agency or instrumentality, the statement to be circulated by either one of the following means:

(1) By mailing, within six (6) months after entry of this Final Judgment, to the currently active list of schools, libraries and governmental agencies

and instrumentalities to whom it mails catalogues; or

(2) By publication in an issue of *School Library Journal* published not later than two (2) months after entry of this Final Judgment.

(C) Within six (6) months after entry of this Final Judgment, to furnish plaintiff with a written statement of the form and manner of compliance with the provisions of subsection (B) of this Section IV;

(D) For a period of one (1) year after entry of this Final Judgment, to furnish a copy thereof to any school, library or governmental agency or instrumentality requesting it.

V.

For a period of five (5) years after the date set forth in this Section V, defendant is enjoined and restrained, in connection with the pricing of its books, except textbooks, from directly or indirectly, in any manner, using the words "net" or "net price" in or on such books or in any catalogue, price list, circular or other bulletin when referring to such books; provided, however, that this Section V shall not apply to any now-existing copies of such catalouges, price lists, circulars or other bulletins until July 1, 1968 or to now-existing copies of such books.

VI.

Defendant is enjoined and restrained from, directly or indirectly in any manner:

(A) Fixing, determining, dictating, approving, disapproving, or policing the customers to whom, or the prices or related terms and conditions of sale at or upon

which any reseller may have sold, sells, advertises or offers to sell any books to any customer;

(B) Suggesting (otherwise than by imprinting any price, without more, on a book jacket) to any reseller the prices or related terms and conditions of sale at which said reseller should sell, advertise or offer to sell any books to any customer;

(C) Hindering, restricting, limiting or preventing, or attempting to hinder, restrict, limit or prevent any reseller from advertising for sale, selling or offering to sell any books (1) to any customer or (2) to any customer at any price or related terms and conditions of sale individually determined by such reseller;

(D) So long as defendant sells books to resellers, refusing to sell or offer to sell or threatening to refuse to sell or offer to sell such books to, or coercing, or discriminating in the sale or shipment of any books to, any reseller because of the prices at which said reseller intends to sell or has sold any books to any customer;

(E) Inducing or suggesting to any reseller that such reseller refuse to deal with or discriminate against any third person with respect to the sale, distribution, purchase or shipment of any books to any customer; and

(F) Issuing or disseminating defendant's customer prices in any promotional material directed to resellers or in any price catalogues, lists, circulars or bulletins with respect to books sold by resellers unless such material contains a statement, in easily legible type, that any reseller is free to charge whatever price he wishes for defendant's books; provided, however, that this Section (F) shall not apply to any now-existing copies of such promotional material, catalogues, lists, circulars or bulletins until July 1, 1968.

Provided that, upon the expiration of a period of five (5) years following the date of entry of this Final Judgment, nothing contained in Section VI of this Final Judgment shall prohibit the defendant from lawfully exercising such rights, if any, or performing such obligations, if any, as it may have arising under the Miller-Tydings Act and the McGuire Act.

VII.

In addition to the prohibitions of Section VI, above, defendant is enjoined and restrained from entering into, adhering to, maintaining, enforcing or claiming any rights under any contract, agreement, understanding, plan or program with any person engaged in the resale of books purchased from defendant to:

(A) Fix, establish, maintain or adhere to prices in the sale of its books to any third person;

(B) Refuse to sell its books to any third person because of the price or prices at which, or persons to whom such third person intends to sell, advertise, or display or may have sold, advertised or displayed such books;

(C) Submit collusive or rigged bids or quotes for supplying any of its books to any third person; or

(D) Bid or quote a specific price, or refrain from bidding or quoting, on any of its books to be sold to any third person;

Provided that, subject to Section VI of this Final Judgment, nothing contained in this Section VII shall prohibit the defendant from lawfully exercising such rights, if any, or performing such obligations, if any, as it may

have arising under the Miller-Tydings Act and the McGuire Act.

VIII.

Nothing contained in this Final Judgment shall be deemed to prohibit the defendant from complying with requirements imposed upon it by State or local law or by any governmental agency or instrumentality acting pursuant to State or local law.

IX.

For a period of five (5) years following the date of the entry of this Final Judgment, defendant is ordered and directed to furnish simultaneously with each sealed bid and sealed quotation (other than a bid or quotation for a sale which will involve less than $100) submitted by it to any customer for the sale of books, other than textbooks, a written certification by the official of defendant having authority to determine the price or prices bid or quoted that said bid or quotation was not the result, directly or indirectly, of any agreement, understanding, plan, or program between defendant and any other person.

X.

For the purpose of securing compliance with this Final Judgment, and for no other purpose, duly authorized representatives of the Department of Justice shall, upon written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to defendant (which may have counsel present), made through its principal office, be permitted, subject to any legally recognized privilege, (1) access during reasonable office hours to all books, ledgers, accounts, correspondence, memoranda and other records

and documents in the possession or under the control of the defendant relating to any of the subject matters contained in this Final Judgment, and (2) subject to the reasonable convenience of defendant, and without restraint or interference from it to interview officers or employees of the defendant, who may have counsel present, regarding any such matters; and upon such request, defendant shall submit such reports in writing, under oath if so requested, to the Department of Justice with respect to any of the matters contained in this Final Judgment as may from time to time be requested for the enforcement of this Final Judgment. No information obtained by the means provided in this Section X shall be divulged by any representative of the Department of Justice to any person, other than a duly authorized representative of the Executive Branch of plaintiff, except in the course of legal proceedings to which the United States of America is a party for the purpose of securing compliance with this Final Judgment or as otherwise required by law.

Any such information evidencing a violation of this Final Judgment which adversely affects the interest of any State or local governmental agency or instrumentality shall be retained by plaintiff for a period of one (1) year from the time when it is obtained and shall be treated as impounded subject to further order of this Court which, on motion and notice to the parties and a showing of good cause by the principal law officer of any State or local governmental agency or instrumentality, may order disclosure to such officer of any part or all of such information as the Court deems proper for use by such agency or instrumentality preliminarily to or in connection with an action under the federal antitrust laws.

XI.

Jurisdiction is retained for the purpose of enabling either of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment or for the modification or termination of any of the provisions thereof, and for the enforcement of compliance therewith and punishment of violations thereof.

Dated: November 27, 1967.

Enter:

/s/ Abraham L. Marovitz
United States District Judge

SUPREME COURT, U. S.

FEB 23 19

JOHN F. DAVIS, CL

No. 1146

IN THE

Supreme Court of the United States

October Term, 1967.

SCHOOL DISTRICT OF PHILADELPHIA, CITY OF PHILADELPHIA, STATE OF MICHIGAN, STATE OF ALASKA, CITY OF ROCHESTER, CITY OF MADISON HEIGHTS, CITY OF LOS ANGELES, BOARD OF EDUCATION OF THE CITY OF PASSAIC, DOWNINGTOWN AREA SCHOOL DISTRICT, RAHWAY BOARD OF EDUCATION, CITY OF TAMPA, MADISON SCHOOL DISTRICT, BOARD OF EDUCATION OF NEWARK, BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, BOARD OF PUBLIC INSTRUCTION OF DADE COUNTY, LINDEN BOARD OF EDUCATION,

Appellants,

v.

UNITED STATES OF AMERICA, HARPER AND ROW PUBLISHERS, INC., THE BOBBS-MERRILL COMPANY, INC., CHILDRENS PRESS INC., THOMAS Y. CROWELL COMPANY, DODD, MEAD & COMPANY, INC., E. P. DUTTON & COMPANY, INC., GOLDEN PRESS, INC., GROSSET AND DUNLAP, INC., HOLT, RINEHART & WINSTON, INC., LITTLE, BROWN & COMPANY, INC., THE MACMILLAN COMPANY, WILLIAM MORROW & COMPANY, INC., G. P. PUTNAM'S SONS, RANDOM HOUSE, INC., CHARLES SCRIBNER'S SONS, THE VIKING PRESS, INC., HENRY Z. WALCK, INC. and FRANKLIN WATTS INC.

On Appeal From the United States District Court for the Northern District of Illinois, Eastern Division.

JURISDICTIONAL STATEMENT.

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NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

SCHOOL DISTRICT OF PHILADELPHIA, ET AL.

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

JURISDICTIONAL STATEMENT.

Appellants, School District of Philadelphia, et al., appeal from the Orders of the United States District Court for the Northern District of Illinois, Eastern Division, in *United States of America v. Harper & Row Publishers, Inc.*, and related cases, Civil Actions No. 67 C 612 through 67 C 629, entered on November 27, 1967, which, *inter alia*, denied appellants' motions, filed on November 13, 1967:

(a) To intervene under Rule 24 of the Federal Rules of Civil Procedure and

(b) For an order rejecting the proposed consent judgments in those cases unless the consent judgments included limited admissions, by defendants, of violations of Section I of the Sherman Act.

Appellants also appeal from the District Court's Orders approving the consent judgments, which were entered below on November 27, 1967. Appellants submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial federal questions are presented.

OPINION BELOW.

There was no opinion in the court below.

JURISDICTION.

These eighteen related civil actions were brought by the United States against eighteen publishers of children's books pursuant to section IV of the Sherman Act, 26 Stat. 209, as amended, 36 Stat. 1167, 62 Stat. 609, 15 U. S. C. Sec. 4, to enjoin violations of Section I of the Sherman Act, 26 Stat. 209, as amended, 50 Stat. 693, 69 Stat. 282, 15 U. S. C. Sec. 1.

Stipulations consenting to the entry of final judgment were executed by the United States and all publisher-defendants and were filed in the court below on October 23, 1967, providing for the entry of final judgment at any time after the expiration of thirty days from the date of filing, absent withdrawal of consent by the United States. On November 13, 1967, appellants, sovereign states of the United States, cities, and public institutions, and major purchasers of children's books, filed applications for leave to intervene. On November 27, 1967, the Order of the District Court (Appendix A) was entered, denying appellants applications and, on the same date, the District Court entered identical orders, approving, with certain modifica-

tions, the consent judgments (Appendix B). Appellants' notice of appeal was filed on January 26, 1968 in the District Court.

The jurisdiction of the Supreme Court is conferred by Section II of the Expediting Act of February 11, 1903, 32 Stat. 823, as amended, 36 Stat. 1167, 58 Stat. 272, 62 Stat. 989, 15 U. S. C. Sec. 29. *Cascade Nat. Gas Corp. v. El Paso Nat. Gas Company,* 386 U. S. 129, 87 S. Ct. —, 17 L. Ed. 2d 814 (1967); *Allen Calculators, Inc. v. Nat. Cash Register Co.,* 322 U. S. 137, 64 S. Ct. 905, 88 L. Ed. 1188 (1944), *reh. den.,* 322 U. S. 771, 64 S. Ct. 1257, 88 L. Ed. 1596 (1944); *Missouri-Kansas Pipeline Company v. U. S.,* 312 U. S. 502, 61 S. Ct. 666, 85 L. Ed. 975 (1941), *reh. den.,* 312 U. S. 715, 85 L. Ed. 1145 (1941); *U. S. v. California Co-op. Canneries,* 279 U. S. 553, 49 S. Ct. 423, 73 L. Ed. 838 (1929).

QUESTIONS PRESENTED.

1. Where the United States has brought related civil antitrust actions against eighteen book publishers, charging price fixing conspiracies and other anti-competitive activities in the sale of children's books purchased with public funds expended by federal, state and local governments; and where, prior to court approval of proposed consent decrees in such actions, and prior to the expiration of the 30 day period following the filing of such decrees during which the United States had the right to withdraw its consent, appellants sought leave to intervene:

(a) Did the District Court err in refusing to grant intervention under Federal Rule of Civil Procedure 24 to appellant states, cities, and public institutions for the specific protection of whose interests such actions were instituted by the United States?

(b) Did the District Court err in refusing to condition its approval of the proposed consent decrees upon the inclusion therein of limited admissions by defendants of violations of Section 1 of the Sherman Act, where state and local governments were already spending substantial funds pursuing private antitrust actions to recover overcharges suffered as a result of the same price-fixing violations alleged in the actions brought by the United States, such actions having been brought in the discharge of its statutory duties to enforce the antitrust laws effectively?

STATEMENT OF THE CASE.

A. Federal Proceedings.

Appellants are sovereign states of the United States and also cities and public institutions who, during the period 1956 to the present, have made and continue to make substantial purchases of children's books directly or indirectly from defendants in the civil actions described below and from publishers and wholesalers who are alleged co-conspirators of the defendants. On April 18, 1967, eighteen separate civil actions were filed by the United States of America in the Northern District of Illinois, Eastern Division, against separate defendant publishers, charging in each instance that the defendants involved, together with other companies and persons unnamed, participated in an unlawful combination and conspiracy commencing at various dates indicated, as early as 1961, to restrain the interstate trade and commerce of the sale of library editions of children's books in violation of Section 1 of the Sherman Act; that this combination and conspiracy consisted of a continuing agreement to fix, maintain and stabilize the prices of library editions of children's books, and resulted in high, artificial and non-competitive levels of prices, the suppression of price competition, and the elimination of the benefits of competitive bidding. It was alleged in each of these complaints (Appendix C) that "most of these purchases [of children's books] are made with public funds expended by State and local governments and by the Federal Government. Substantial amounts of federal funds are made available to State and local governments for the purchase of children's books." (Complant, Paragraph 8).

On October 23, 1967, before hearings were commenced, a stipulation was filed with the District Court by the United States Department of Justice, Antitrust Division, and each of the defendant publishers in the eighteen separate proceedings, consenting to the entry of final judgments after the expiration of thirty days from filing of the stipulation, unless the Federal Government withdrew its consent prior thereto. Each final judgment provided for dismissal of the federal proceedings under Orders which in general would enjoin each of the defendants from future price-fixing activities and collusive bidding for a period of five years. Each of the suggested final judgments was to provide:

> "Plaintiff, United States of America, having filed its complaint herein on April 18, 1967, and defendant having filed its answer thereto denying the substantive allegations thereof, and plaintiff and defendant by their respective attorneys having consented to the making and entry of this Final Judgment without admission by either party in respect to any issue;
>
> Now, THEREFORE, before any testimony has been taken herein, without trial or adjudication of any issue of fact or law herein, and upon consent of the parties hereto, it is hereby,
>
> ORDERED, ADJUDGED and DECREED . . ." [text omitted] (Appendix B, Final Judgment, Preamble).

B. Intervention by States and Municipal Bodies.

Section 5(a) of the Clayton Act, 38 Stat. 731, as amended, 69 Stat. 283, 15 U. S. C. Sec. 16(a), provides:

> "A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the anti-

> trust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws . . . as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided,* That this section shall not apply to consent judgments or decrees entered before any testimony has been taken . . ."

The Congress of the United States by various enactments, including the "Elementary and Secondary Education Act of 1965, 79 Stat. 36, 20 U. S. C. Sec. 821 et seq., has appropriated substantial amounts for the purpose of making grants to states:

> "For the acquisition of school library resources, textbooks, and other printed and published instructional materials for the use of children and teachers in public and private elementary and secondary schools." 20 U. S. C. Sec. 821.

Pursuant to such federal acts, and during the period of the alleged illegal conspiracy, substantial allocations and grants of federal funds for the purchase of library books have been made to the appellant states, which in turn distributed such funds to state agencies, institutions, and public schools who purchased library editions of children's books. Appellants represent a multitude of public agencies, school districts, and public libraries (Tr., November 13, 1967, p. 10).

Private treble damage actions have been filed by appellants in the Eastern District of Pennsylvania (Civil Action No. 40537),[1] naming as defendants, among others,

1. Treble damage actions on behalf of other states and municipalities have been filed in the Northern District of California, the District of Kansas, the Northern District of Illinois, the Eastern

the eighteen publishing companies who are separately named as defendants in these present actions and alleging substantially the same conspiracy as that alleged here. Appellants' treble damage complaint charges the existence of a combination and conspiracy among the eighteen publisher-defendants and other publishers and wholesalers of library editions of children's books, during the period from a date at least as early as 1956 to date, to fix, maintain and stabilize the prices of such books sold to plaintiff states and public institutions, which resulted in the payment of high, artificial and non-competitive prices. Threefold damages are sought for the substantial injury and damage caused by the alleged conspiracy.

An adjudication of the merits of the issues in the cases brought by the Justice Department would involve matters and issues which would also have to be determined in the private treble damage actions. Under Section 5(a) of the Clayton Act, the adjudication of such matters and issues adversely to defendants in the proceedings brought by the *Justice Department would then be prima facie evidence* against such defendants in the state and local treble damage actions.

Before the consent decrees had been signed by the District Judge, on November 13, 1967, appellants moved for leave to intervene [2] in the Justice Department's actions pursuant to Federal Rule of Civil Procedure 24; and re-

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District of Massachusetts, and the Western District of Wisconsin. Also, the attorneys general and municipal attorneys of other states and cities have expressed their intention to the court to file treble damage actions on behalf of their respective states and cities. *Brief in Support of Petition for the Preservation of Documents,* In re Grand Jury Proceedings, No. 66 GJ 3003, N. D. Ill., E. Div., p. 4 (Dec. 8, 1967).

2. States, cities and municipal bodies who are parties to treble damage actions in Districts other than the Eastern District of Pennsylvania also moved to intervene, requesting similar relief. Their motions and requests for relief were denied by the same Order from which this appeal is taken. These other states, cities and municipal bodies are taking separate appeals from this Order to this Court.

quested that the proposed consent judgments be rejected by the Court unless the defendants agreed to the inclusion of limited admissions of violations of Section I of the Sherman Act for the sole purpose of giving *prima facie* effect to such admissions in appellants' pending treble damage actions.

On November 27, 1967, the District Court denied appellants' motion to intervene (Appendix A) and entered Orders (Appendix B) approving the consent judgments entered between the United States and the eighteen defendant-publishers, substantially in the form originally submitted by the parties to the Court.[3]

The dismissal of the federal proceedings under the consent judgments approved by the District Court are "without admission" by the defendants of any matter or issue encompassed by the charges made that an unlawful price-fixing combination and conspiracy existed over many years which substantially injured and damaged public purchasers of library editions of children's books. The proposed consent judgments provide defendants with an innocuous escape from the consequences of past serious legal offenses under the promise of not engaging in future similar illegal activities. By this device the public victims of the price-fixing conspiracy are denied substantial help and benefit, in recovering damages, from the Justice Department's proceedings.

The Antitrust Division of the Department of Justice conducted an extensive investigation of the facts prior to filing their Complaint. This investigation of facts was aided by inquiries conducted in March and May, 1966, by

3. Appellants also requested certain relief with respect to documents which had been collected by the Justice Department during the course of the federal investigation and grand jury proceedings. This relief was substantially granted by the District Court and from this part of the Order appellants do not appeal.

the "Subcommittee on Antitrust and Monopoly of the Committee of the Judiciary of the United States Senate", under the chairmanship of Senator Philip Hart of Michigan. By the employment of simple consent decrees, the fruit of these extensive investigative labors now comes to no more than an assurance that defendant publishers will not violate the antitrust laws in the future.

THE QUESTIONS ARE SUBSTANTIAL.

A. The Economic and Social Impact of the Case.

As the District Judge recognized, these cases are of great economic importance:

> "I think where taxpayers' money is directly involved and where the charge is as serious as the charge made here that involves millions of dollars, not only of government money that went towards the support and purchase of school textbooks, but of local taxpayers, that we should give consideration to accommodate those seeking to intervene to the extent that we can . . ." (Tr., November 13, 1967, p. 169).

Senator Philip A. Hart, Chairman of Subcommittee on Antitrust and Monopoly of the Committee of the Judiciary of the United States Senate, stated at the outset of the Senate's investigation of price fixing in sales of children's books:

> "The basic question at this hearing is simple: Is an agreement between publishers and wholesalers forcing librarians to pay inflated prices for children and youth books?
>
> "The question certainly is not an idle one. Librarians will testify that more and more they are forced to buy children's books which cost 50 per cent more than other editions of the same books. Further, they will testify that when they ask for bids in order to get competitive prices that the prices are not competitive—but identical.
>
> "A school librarian will testify that approximately 60 per cent of the books offered her library are available only in inflated-price editions. Librarians will

tell us that the percentage figure is growing annually. . . .

"The books involved account for about one-half of the circulation of public libraries. Not only are they purchased with taxpayers' funds, but the Federal Government and many local and State governments are on a concerted campaign to increase appropriations for books. Congress would not like to increase appropriations if—as librarians tell us—the federal money is simply covering the difference between the best price and the price librarians must pay for these books . . .

"Book prices [the Senate Committee on Labor and Public Welfare] pointed out—are now 31 per cent more than in 1957-59." *Hearings before the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary of the United States Senate, 89th Congress, Second Session, March 23, 1966,* transcript, p. 1-2.

The legal questions involved are no less important. These questions involve (a) a clarification of the rights of public bodies to intervene in federal antitrust actions involving important state and local interests, pursuant to Federal Rule of Civil Procedure 24 as recently interpreted in *Cascade Natural Gas Corp. v. El Paso Natural Gas Company,* 386 U. S. 128, 87 S. Ct. —, 17 L. Ed. 2d 814 (1967), and (b) the propriety of permitting the avoidance of the *prima facie* effect of Section 5(a) of the Clayton Act by the entry of consent judgments in cases involving flagrant price-fixing in an industry vital to the welfare of the United States and its citizens.

B. The Question of Intervention.

The initial question before this Court is whether or not appellants should have been granted leave to intervene, under the recently-amended Federal Rule of Civil Proce-

dure 24(a), as a matter of right, or permissively under Federal Rule of Civil Procedure 24(b). Federal Rule of Civil Procedure 24 provides in pertinent part:

> "(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and *he is so situated that disposition of the action may as a practical matter impair or impede his ability to protect that interest,* unless the applicant's interest is adequately represented by existing parties . . .
>
> "(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common . . ." (Emphasis supplied)

The right of public and private parties to intervene in a proceeding, in which a decree enforcing the antitrust laws is being framed, has recently been upheld by this Court in *Cascade Natural Gas Corp. v. El Paso Natural Gas Company, supra.* In this case, Southern California Edison, a large industrial user of natural gas, Cascade Natural Gas Corporation, a distributor of natural gas, and the State of California moved to intervene in the proceeding in which an order was being framed providing for divestiture by major gas producers. Southern California Edison and the State of California were moving for intervention under the former F. R. C. P. 24(a), prior to the recent amendment effective July 1, 1966. This Court ruled that all applicants were to be granted leave to intervene as of right, stating:

> "In the present case protection of California interests in a competitive system was at the heart of our

mandate directing divestiture . . : It was indeed their interests, as part of the public interest in a competitive system, that our mandate was designed to protect." *Ibid.*, 17 L. Ed. 2d at 819.

In the present case, appellant states and municipal bodies were purchasers from defendants, and it is appellants' interests that these federal civil proceedings were designed to protect.

Intervention by private parties, within that class to be protected by the consent judgment, has been permitted in consent decree proceedings. *Missouri-Kansas Pipe Line Company v. U. S.*, 312 U. S. 502, 85 L. Ed. 975 (1941), *reh. den.*, 312 U. S. 715, 85 L. Ed. 1145 (1941); *U. S. v. Vehicular Parking, Ltd.*, 7 F. R. D. 336 (D. Del. 1947). See also *U. S. v. Terminal R. R. Association*, 236 U. S. 194, 59 L. Ed. 535 (1915); *U. S. v. Swift & Company*, 286 U. S. 106, 76 L. Ed. 999 (1932).

There is no question that appellants' motion to intervene was timely, having been filed within twenty-one days after the initial filing of the proposed consent judgments.[4] Moreover, it is clear that, prior to the attempted intervention, appellants were not adequately represented by existing parties; both the government and all defendants were opposed to the relief sought by appellants, and both had provisionally approved the consent decrees to which appellants objected and continue to object. Appellants were "without a friend in this litigation", *Atlantis Development Corp., Ltd. v. United States*, — F. 2d —, 11 F. R. Serv. 2d 24(a) 2, Case 1, p. 348 (5th Cir. 1967).

The important question to be decided by this Court under new Rule 24, as recently interpreted in *Cascade*, is

4. In this sense, this case is readily distinguishable from *U. S. v. Blue Chip Stamp Co.*, 1967 Tr. Cas. ¶ 72,239 (C. D. Cal. 1967), *aff'd.* sub nom. *Thrifty Shoppers Scrip Co. v. U. S.*, 36 L. W. 3278 (1968), in which the petitions to intervene were filed after approval of the consent decrees by the Court.

whether or not appellants have an interest which falls within the protective scope of F. R. C. P. 24(a)(2), or, in the alternative, whether denial of leave to intervene under F. R. C. P. 24(b) was an abuse of discretion by the court below.[5] The Fifth Circuit, in a recent decision following *Cascade,* has taken a liberal and expansive view of the nature of the interests protected by Rule 24. *Atlantis Development Corp., Ltd. v. United States, supra.* In that case, Atlantis Development Corporation was denied intervention in a suit instituted by the Government against defendants in which the Government sought to assert dominion and control over a number of coral reefs, charging trespass against the defendants. Atlantis claimed ownership of the reefs. The Circuit Court, in reversing the District Court, held that Atlantis should have been permitted to intervene as of right. The Court stated that new Rule 24 had done more than "to abandon the rigidity of Sam Fox[6] and codify the ameliorative exceptions . . . [of case law development which had been necessary] to escape the unfortunate consequences of a ruling expressed in terms of the party being 'bound', i.e., *res judicata.*" *Ibid.* at p. 348. The Court further stated that, in its revision of Rules 19, 23 and 24, the Advisory Committee, "unsatisfied with the former Rules which too frequently defined application in terms of rigid legal concepts such as joint, common ownership, *res judicata,* or the like, as well as court efforts in applying them, deliberately set out on a more pragmatic course." *Ibid.* at p. 347. See also *Cascade Nat. Gas Corp. v. El Paso Nat. Gas Co., supra,* 17 L. Ed. 2d at 818, n. 3. Turning to the facts before it, the Court recognized that "the judgment as between the Government and defendants

5. The issues of law and fact in appellants' actions and the Federal action are substantially identical, save for the issue of damages.

6. *Sam Fox Publishing Co. v. U. S.,* 366 U. S. 683, 81 S. Ct. 1309, 6 L. Ed. 2d 604 (1961).

cannot have any direct, immediate effect upon the rights of Atlantis, not a party to it." *Atlantis Development Corp., Ltd. v. U. S. supra,* at p. 349. However, the pragmatic approach dictated by new Rule 24 demanded that intervention be granted. Certain questions of law which would ultimately be involved in a separate suit between Atlantis and the United States would necessarily be decided in the case before the Court. The court squarely held that the weight of precedent which would be given to these decisions of questions of law might be such an obstacle to Atlantis, if decided contrary to their interests, that as a practical matter their intervention in the suit was the only way that they could properly protect their interest.

In the instant case, the dismissal of the Federal proceeding under the consent judgments approved by the District Court are "without admission" by the defendants of any matter or issue encompassed by the charges made that an unlawful price-fixing combination and conspiracy existed over many years which substantially injured and damaged public purchasers of library editions of children's books. Such consent judgments, which preclude the use by appellants of Section 5(a) of the Clayton Act, will deprive appellants of the many benefits of the resources and expertise of the Federal Government in the field of antitrust enforcement. (However, the Federal Government, through the Comptroller General of the United States, might well demand a share of any treble-damage recovery, claiming that it is entitled to that proportion of the recovery equivalent to the Federal Government's contribution made under the Elementary and Secondary Education Act of 1965. See Letter of Comptroller General of the U. S. to Admin., F. H. A., Department of Transportation, October 11, 1967, 1967 Tr. Case ¶72,250.) Such consent judgments will place directly upon the states and municipal bodies the entire burden of labor and expense for recouping, for their citi-

zenry, unlawful charges made in flagrant violation of federal statutes. The practicalities of private antitrust enforcement clearly demonstrate that appellants' interests in the prosecution of their rights, as amplified by Congressional policies to assist private treble damage litigants, are thus severely impeded and impaired.

Appellants will not only be impeded, as a practical matter, but will be precluded from the relief they seek if they are denied intervention in the instant case. Appellants asked the District Court to reject proposed consent decrees. There was no forum other than the Northern District of Illinois in which to request this relief.

Appellants seek to protect their interests in that portion of the competitive system which involves a commodity, children's books, which is vital to the welfare of this country. The form of judgment sought by appellants would be a public admission, by the publisher defendants, that they have engaged in unlawful acts. Such public confession would have a strong ameliorative effect on the publishing industry, not only by force of the stigma attached to the public confession, but by force of the fact that public libraries throughout the country will be put on notice of the Sherman Act violations of defendants and be alerted to insure enforcement of the Final Decree entered by the District Court. Having been denied intervention, the consent decrees, entered over appellants' objection, provide neither a public admission of guilt nor the benefits provided by Section 5(a) of the Clayton Act.

The Court below did not choose to take the liberal approach towards the new Rule 24 which was taken by the Fifth Circuit in *Atlantis* and which, it is submitted, is called for by the *Cascade* decision. A recent case in the Ninth Circuit, distinguishable on its facts from this case, has also taken a restrictive view of Rule 24. *U. S. v. Blue Chips Stamp Company,* 1967 Tr. Cas. ¶72,239 (C. D. Cal. 1967).

In that case, petitioners moved to intervene in a government suit *after* its settlement by consent decree. Petitioners were also parties to private antitrust actions charging antitrust violations similar to those settled in the government suit. Intervention was denied.[7] The Court, by citing *Sam Fox Publishing Company, et al. v. U. S., supra,* and *Sutphen Estates, Inc. v. U. S.*, 342 U. S. 19, 72 S. Ct. 14, 96 L. Ed. 19 (1951), *reh. den.*, 342 U. S. 907, 72 S. Ct. 289, 96 L. Ed. 679 (1952), evidenced a reluctance to depart from a view of intervention as of right, which, as expressed in those cases, was found too restrictive and formalistic by the Advisory Committee to the 1966 Amendments to the Rules. *Notes of the Advisory Committee on Revision of the Fed. Rules of Civ. Proc.*, 39 F. R. D. 110.

The Court in *Blue Chips* discussed the *Cascade* decision only in its discussion of timeliness, holding that in *Cascade* the Supreme Court had done no more than to exercise its right to protect and to assure obedience to its own previous mandate. It is true that in the litigation out of which *Cascade* arose, divestiture, under Section 7 of the Clayton Act, had previously been ordered by the Supreme Court, which divestiture the Court stated had not in any meaningful sense been accomplished. However, the majority opinion did not rest on this narrow ground. The Supreme Court stated that it was "California Interests" that were at the heart of the mandate. *Cascade Nat. Gas Corp. v. El Paso Nat. Gas Co., supra,* 17 L. Ed 2d at 819. Cascade Natural Gas Corporation, the only intervenor whose inter-

7. Thrifty Shoppers Scrip Company, one of the petitioners, filed its Notice of Appeal from the denial of intervention with this Court on November 15, 1967, and the decision of the District Court was affirmed by the U. S. Supreme Court sub nom., *Thrifty Shoppers Scrip Co. v. U. S.*, 36 L. W. 3278 (1968). In *Blue Chip*, as distinguished from this present case, the consent decree had been the subject of prolonged negotiations and modifications, and, prior to the applications to intervene, had been twice rejected by the District Court.

vention as of right was decided under new Rule 24, was a distributor of natural gas in Oregon and Washington. Without referring to its previous mandate, the Court stated that new Rule 24(a) was broad enough to include *Cascade*.

The antitrust laws lie at the heart of our competitive system. It is important that this Court clarify the rights of states and municipal bodies to protect their interests in that competitive system by intervening in antitrust actions brought by the United States where consent decrees are expected to terminate such actions. It is important that the effect of *Cascade* on this right of intervention be clarified in order to reconcile the disparate approaches to the interpretation of this decision evidenced by the liberal view of the Fifth Circuit in *Atlantis* and the restrictive view of the Ninth Circuit in *Blue Chips*.

C. The Question of the Propriety of the Consent Judgments.

The second important legal question before this Court is the propriety of the entry of consent judgments, containing denials of guilt, in cases involving flagrant violations of the antitrust laws in sales of a vital product, resulting in illegal charges paid by state and federal government funds.

Appellants requested in Paragraph Eight of their Motion to Intervene that the following language be added to the consent judgments:

> "(Defendants) having admitted the allegations contained in the Government's complaint herein, solely for the purpose and to the extent necessary to give to the following adjudication the *prima facie* effect stated in Sec. 1 . . .
>
> "Section 1. On the basis of the limited admission, defendants hereto engaged in an unlawful combination and conspiracy in violation of Section 1 of the Sherman Act as charged in the complaint, this adjudication

being for the sole purpose of establishing the *prima facie* effect of the Final Judgment in the suits specified below and for no other purpose:

"Each defendant is enjoined and restrained from denying that this Final Judgment has such *prima facie* effect in any such suit; provided, however, that this section shall not be deemed to prohibit any such defendant from rebutting such *prima facie* evidence or from asserting any defense with respect to damages or other defenses available to it." (The specific state suits so advantaged are then enumerated).

The District Court rejected this request. The consent judgments approved and entered by the District Court do not contain such language, although it was within the power of the Court to refuse to approve the consent judgments absent appellants' requested modification. "It is certainly within the power of the court to reject a proposed decree even when both sides consent." Dabney, *Consent Decrees Without Consent*, 63 Col. L. Rev. 1053, 1064 (1963). See also *U. S. v. Blue Chip Stamp Co., supra* at p. 84,502, in which the Court rejected a proposed decree and "outlined certain requirements it believed essential to any decree in settling the case."

The language proposed by petitioners is substantially similar to the "asphalt clause" which was made part of consent judgments entered in civil antitrust actions against a number of defendants for alleged price-fixing and bid-rigging in sales of asphalt, road tar, and bituminous concrete to governmental bodies in the New England area. *U. S. v. Allied Chemical Corp.*, 1961 Tr. Cas. ¶ 69,923 (D. Mass. 1960); *U. S. v. The Lake Asphalt & Petroleum Company of Massachusetts*, 1960 Tr. Cas. ¶ 69,835 (D. Mass. 1960); *U. S. v. Bituminous Concrete Association, Inc.*, 1960

Tr. Cas. ¶ 69,878 (D. Mass. 1960); See also *U. S. v. Koppers Company, Inc.*, 1961 Tr. Cas. ¶ 69,924 (D. Mass. 1960). In companion criminal cases, *nolo contendere* pleas had been accepted. Massachusetts Attorney General Edward J. McCormack, Jr., who had unsuccessfully appeared in opposition to the acceptance of the *nolo* pleas, urged, in a letter to the United States Attorney General, that some protective provision for the injured public bodies be included in the consent decrees. He stated:

> "To accept a *nolo* plea in a criminal case and then a consent decree in a civil action completely destroys for all intents and purposes the rights of the treble damage litigant which, in this case, happens to be sister-governments, i.e., the State of Massachusetts and the cities and towns therein." Letter from Massachusetts Attorney General Edward J. McCormack, Jr. to United States Attorney General William P. Rogers, February 13, 1960, quoted in Kaplan, *The Asphalt Clause—A New Weapon in Antitrust Enforcement*, Vol. III, No. 3, Boston College Industrial and Commercial L. Rev., 355, 358 (1962).

Since the entry of the "asphalt clause" consent decrees, the Antitrust Division of the Department of Justice

> "is now appraising the wisdom of considering, as one element of the public interest test which guides acceptance or rejection of the consent decree, the interest of the state or its subdivisions primarily injured by the violations alleged. This policy would apply where a state or its subdivision has borne the prime brunt of the violation alleged." Letter of Robert A. Bicks, Acting Assistant Attorney General, Antitrust Division, Department of Justice, March 30, 1960, 2 Tr. Reg. Rep. ¶ 8811.72.

On another occasion Mr. Bicks has stated:

> "We have felt that one of the factors properly to be considered by the Department of Justice and the courts alike in determining whether consent decrees should be accepted is the impact of any such acceptance upon the practical ability of the states and municipalities to secure recompense for the losses suffered by their citizenry . . . Thus we seek to make effective the right granted by Congress to the States to secure appropriate recompense." Bicks, *Antitrust Today*, 1961 N. Y. State B. A. Antitrust Law Symposium 15, 20.

The purpose of the "asphalt clause" is to advance the Congressional policy expressed in Section 5 of the Clayton Act, 15 U. S. C. Section 16, which makes a final judgment in any civil proceeding brought by the United States under the antitrust laws *prima facie* evidence against the defendants in any parallel action or proceeding brought by another party against those defendants. Section 5 provides that it does not apply to consent judgments or decrees entered before any testimony has been taken.

Congress, through Section 5 "has expressed its belief that private antitrust litigation is one of the surest weapons for the effective enforcement of the antitrust laws." *Minnesota Mining and Manufacturing Company v. New Jersey Wood Finishing Co.*, 381 U. S. 311, 318, 85 S. Ct. 1473, 14 L. Ed. 2d 405, 411 (1965). The purpose of Section 5 is to "assist private litigants in utilizing any benefits they might cull from government antitrust actions," *ibid.*, 381 U. S. at 317, 41 L. Ed. 2d at 410, and to "minimize the burdens of litigation for injured private suitors," *Emich Motors Company v. General Motors Corp.*, 340 U. S. 558, 568, 95 L. Ed. 534, 544 (1951), *reh. den.*, 341 U. S. 906, 96 L. Ed.

1345 (1951). See also *City of Burbank v. General Electric Co.*, 329 F. 2d 825, 835 (9th Cir. 1964); *Bruce's Juices v. American Can Company*, 330 U. S. 743, 751, 91 L. Ed. 1219, 1226 (1947); *Olympic Refining Company v. Carter*, 332 F. 2d 260 (9th Cir. 1964), *cert. den.* 379 U. S. 900 (1964).

> "Private suits for treble damages have always been regarded as one of the strongest methods of securing compliance with the Sherman Act and as an integral part of enforcement policy . . . *The recovery of damages, more than any other means of enforcement, cancels the gains received from the violation and thereby minimizes the incentive to violate. The motivation for a conspiracy in restraint of trade is essentially financial. A financial penalty would thus seem to be an essential deterrent and, in some circumstances, afford a stronger therapeutic effect than criminal penalty or injunctive relief . . . . While the states and municipalities are public bodies, they, like other non-federal litigants, feel the need of a prima facie case. Its availability increases the probability that they will take steps to recover their damages; its absence acts as a discouraging factor, leading to inaction.*" Kaplan, *supra*, at 360-361. (Emphasis supplied.)

The importance of private treble-damage actions in overall antitrust enforcement has been considered and held controlling in the rejection of *nolo contendere* pleas in criminal antitrust proceedings. The acceptance of a *nolo* plea is similar to the effect of the approval of a civil consent decree without an "asphalt clause", in that it denies those directly injured by the violations the benefit of *prima facie* evidence. In *U. S. v. Standard Ultramarine & Color Company*, 137 F. Supp. 167 (S. D. N. Y. 1955), Judge Weinfeld rejected the entry of pleas of *nolo contendere* in Sherman Act prosecutions. Judge Weinfeld stated:

> *"While the defendants' arguments are couched in terms of concern for the public interest, acceptance of the plea would carry with it definite and incalculable advantages to the defendants . . . . It would, and this the defendants acknowledge as an overriding consideration, eliminate the impact of Section 5 of the Clayton Act . . . . And it is exactly for this reason that the Government contends that a plea of* nolo contendere *in this case would defeat rather than promote the public interest."* *Ibid.* at 169. (Emphasis supplied.)

Judge Weinfeld doubted that payment of fines really vindicated the public interest. The same might be said for the injunctions which have been approved in this suit, which do no more than provide that the defendants will comply with the law.

Judge Weinfeld went on to discuss Congress' policy of providing for effective enforcement of the antitrust laws and the expression of this policy in Section 5 of the Clayton Act, which was "fashioned as a powerful weapon to aid private litigants in their suits against antitrust violators by reducing the almost prohibitive costs and staggering burdens of such litigation in making available to him the results of the Government's successful action, whether an equity suit or a criminal prosecution." *Ibid.* at 172. He held that the "slap on the wrist" provided by fines and injunctions is in effect a removal of a powerful deterrent to law violation. See also *U. S. v. Fur Shearers Guild, Inc.*, 1959 Tr. Cas. ¶ 69,321 (S. D. N. Y. 1959).

Judge Weinfeld considered the following factors important in rejecting the *nolo* pleas: (1) the nature of the claimed violations, (2) the alleged length of time of the violations, (3) the size and power of the defendants in the particular industry, and (4) the impact of the condemned

conduct upon the economy. In the *Standard Ultramarine* case the violations alleged extended over a nine-year period. The offense charged was price-fixing, a *per se* violation, "one of the more serious infractions of the law", *ibid.* at 172, and the volume of business of the defendants was substantial: $30,000,000 out of a total national sales volume of $80,000,000. In the instant case the offense alleged is, similarly, price-fixing. Violations are alleged to have extended over at least a ten-year period. Over $100,000,000 worth of children's books are sold yearly to schools, libraries, and government bodies, of which library editions comprise sales of approximately $40,000,000 (Complaint, Paragraph 8) (Appendix C).

Moreover, educational materials are a commodity vital to the nation's welfare. In *U. S. v. Toledo Milk Distributors Association,* 1954 Tr. Cas. ¶ 67,918 (N. D. Ohio 1954), the court, in refusing to accept pleas of *nolo contendere,* rested its decision on the fact that the complaint of the Department of Justice had alleged price-fixing in an industry involving sales of a particularly vital commodity. See also *Commonwealth Edison Company v. Allis-Chalmers Mfg. Co.,* 323 F. 2d 412 (7th Cir. 1963) *(dicta).*

Some courts have declined to reject *nolo* pleas. See *U. S. v. Cigarette Merchandisers Ass'n, Inc.,* 136 F. Supp. 212 (S. D. N. Y. 1955). However, in this case, as was pointed out by Judge Weinfeld in *Standard Ultramarine,* there was pending a companion civil case which was to be litigated; thus private suitors might still be afforded *prima facie* evidence. In the instant case, only civil cases are pending. Absent an "asphalt clause", there is no possibility that applicants will have the benefits of *prima facie* evidence, to assist them in recovering the overcharges imposed on them in violation of antitrust laws by the defendants.

Nolo pleas have been denied by the District Courts in New York, California, Pennsylvania, Nebraska, North Da-

kota, Colorado, Massachusetts and Hawaii. See Citations collected in Clabault and Burton, *Sherman Act Indictments, 1955-1965* (1966), Appendix F (revised 1967).

Potential recoveries in private treble-damage actions are the most effective deterrent of violations of the antitrust laws. In exercising their discretion whether or not to accept *nolo* pleas or whether or not to approve stipulated consent judgments, courts should consider whether or not *prima facie* evidence will be available to plaintiffs in later private civil actions. See *Nolo Pleas in Antitrust Cases*, 79 Harv. L. Rev. 1475, 1481-82 (1966). "In cases of serious violations where substantial private injury has resulted, the policy of Section 5 should override any special considerations that would deny the evidentiary aid to injured parties and would permit defendants to avoid private liability." *Section 5 of the Clayton Act and the Nolo Contendere Plea*, 75 Yale L. J. 845, 867-68 (1966). By the proviso excluding consent decrees from the operation of the *prima facie* effect of government proceedings, Congress did not intend to open the door to any willing defendant to escape from obligations for restitution to injured parties arising from its wrongdoings.

> "Congress made convictions in contested cases and convictions after guilty pleas binding in later suits; to argue that Congress meant, at the same time, to allow any defendant to escape who chose to by saying the magic Latin words is to make a mockery of the policy supporting section 5(a). And since the main purpose of that policy was to aid plaintiffs in treble damage suits, it seems that the effect on such suits should be considered when the court, by accepting or rejecting *nolo*, determines whether the defendant will be excepted from section 5(a)." *Nolo Pleas, supra*, 79 Harv. L. Rev. at 1483.

In the instant case price fixing is involved, as was the case in *U. S. v. Ward Baking Company*, 376 U. S. 327, 331-32, 84 S. Ct. 763, 11 L. Ed. 2d 743, 748 (1964):

> "The conspiracy alleged in the complaint was a particularly flagrant one . . . . 'acts in disregard of law call for repression by sterner measures than where steps could reasonably have been thought permissible.' 340 U. S. at 89-90, 95 L. Ed. at 101. The acts here alleged could not, under any theory, have been thought permissible."

It has been argued that Section 5 expresses a Congressional policy in favor of consent judgments in order to gain speedy enforcement. However, consent judgments absent admissions of guilt are most appropriate when the acts complained of involve new or disputed areas of antitrust law applicability. It is anomalous to approve a consent judgment which is essentially an escape from punishment in cases involving acts which are, undeniably, flagrant, willful, and *per se* illegal.

The states and municipal governments who are appellants here have an unique interest in seeing that the antitrust laws are meaningfully enforced and that the deterrent of treble damage recovery is made feasible by a truly adversary proceeding in the United States' actions. As in *City of Philadelphia v. Westinghouse Electric Corp.*, 210 F. Supp. 486, 489 (E. D. Pa. 1962):

> "The unique nature of these cases . . . must be given considerable weight . . . [M]ost of these plaintiffs—states, municipalities, and public utilities—are inherently charged with the duty to protect wide reaching public interests."

As in the asphalt cases, a state attorney general has written to the United States Attorney General requesting

that, in these book cases, admissions of commission of acts in violation of the Sherman Act be made part of the consent decrees. Letter of Frank J. Kelly, Attorney General of Michigan, to Hon. Ramsey Clark, Attorney General of the United States, November 8, 1967 (Appendix D). Similarly, the National Association of Attorneys General, on August 30, 1967, adopted a resolution recognizing (1) that the various states have been the victims of numerous price fixing conspiracies, (2) the need for treble damage actions to recoup overcharges, and (3) the limitations placed on the attorneys general of the states in adequately investigating and preparing antitrust cases, and resolved that their Antitrust Committee should make recommendations involving ways and means of improving cooperation between the states and the Federal government and among the states in pursuing antitrust remedies (Appendix E).

Private antitrust litigation is growing, *Nolo Pleas in Antitrust Cases, supra* at 1478, and state participation in federal treble damage suits is growing, as the states, more and more, recognize that they have been victimized by overcharges through antitrust violations. We submit that this Court should clarify the rights of the states and municipal bodies to intervene in suits brought by the Government, and to set guidelines to be used by the Nisi Prius court in determining when a consent judgment absent admissions of liability will be approved.

Apart from the importance of the issues of law involved, and their direct impact on all education throughout the United States, there is an additional reason that this Court should review the actions of the District Court. This appeal comes to this Court directly from the District Court, in accordance with the Expediting Act of February 11, 1903, *supra*, 15 U. S. C. Sec. 29. Absent review by this Court, appellants have no other forum to which to turn for

review of what they consider to be erroneous rulings by the District Court.

> "(I)n antitrust cases . . . our practice, particularly in cases of direct appeal from the decree of a single judge, is to examine the District Court's action closely to satisfy ourselves that the relief is effective to redress the antitrust violations proved. 'The relief granted by a trial court in an antitrust case and brought here on direct appeal, thus by-passing the usual appellate review, has always had the most careful scrutiny of this Court.' . . . *International Boxing Club v. U. S.*, 358 U. S. 242, 253, 3 L. Ed. 2d 270, 278, 79 S. Ct. 245 (1959) . . .
>
> "(T)he suit has been a futile exercise if the Government proves a violation but fails to secure a remedy adequate to redress it . . .
>
> "Our practice reflects a situation created by the congressional authorization, under Sec. 2 of the Expediting Act, of a direct appeal to this Court from the judgment of relief fashioned by a single judge. Congress has deliberately taken away the shield of intermediate appellate review by a Court of Appeals, and left with us alone the responsibility of affording the parties a review of his determination. This circumstance imposes a special burden upon us, for, as Mr. Justice Roberts said for the Court, '. . . it is unthinkable that Congress has entrusted the enforcement of a statute of such far-reaching importance to the judgment of a single judge, without review of the relief granted or denied by him.' *Hartford-Empire Company v. U. S.*, 324 U. S. 570, 571, 89 L. Ed. 1198, 1200, 65 S. Ct. 815 (1945)." *U. S. v. DuPont De Nemours & Company*, 366 U. S. 316, 323-35, 81 S. Ct. 1243, 6 L. Ed. 2d 318, 323-24 (1961).

CONCLUSION.

Appellants, in their appeal, present substantial questions of public importance. Probable jurisdiction should therefore be noted.

Respectfully submitted,

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APPENDIX A.

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION.

UNITED STATES OF AMERICA, *Plaintiff*, v. HARPER & ROW PUBLISHERS, INC., et al., *Defendants.*	No. 67 C 612 and related cases 67 C 613 through 67 C 629.

Order.

WHEREAS, on October 23, 1967 the parties to each of the above cases filed a stipulation consenting to the entry of a final judgment therein in the form attached to the stipulation, at any time after the expiration of 30 days following that date, provided that plaintiff could withdraw its consent at any time within the period of 30 days, and

WHEREAS, the period of 30 days has expired and plaintiff has not withdrawn its consent, and

WHEREAS, subsequent to the filing of the stipulations various applications for leave to intervene in the above cases, and supplements and amendments thereto, were filed by the States of Illinois, West Virginia, Massachusetts, Michigan, Texas, Wisconsin, Hawaii, Oregon, Washington, Alaska, Indiana and Ohio, and the Cities of Chicago, San Francisco, San Diego, Boston, New York, Baltimore,

Rochester, Madison Heights, Los Angeles, Tampa, and Philadelphia, and the Boards of Education of the Cities of Chicago, Passaic, Newark, and East Orange, and the School District of Philadelphia, Downingtown Area School District, Rahway Board of Education, Madsion School District, Board of Public Instruction of Dade County, and Linden Board of Education, which applications seek *inter alia* modifications in the form of final judgment and preservation of, and access to, certain documents in the custody of John E. Sarbaugh, Chief of the Midwest Office of the Antitrust Division of the Department of Justice, and

WHEREAS, thereafter memoranda of law were filed by the applicants for intervention in support of their applications, and by plaintiff and by defendants in response and opposition to the applications, and

WHEREAS, on November 13, 1967 the above cases came on for hearing on the applications for intervention; the Court heard oral argument by counsel for the applicants, for plaintiff, and for the defendants; additional modifications in the form of final judgment were orally proposed by counsel for the applicants, some of which were later submitted in writing as part of the applications for intervention; and the Court instructed counsel for plaintiff, defendants and the applicants to meet and discuss the proposed additional modifications as to whether there was any justification for including them in the form of final judgment; and

WHEREAS, thereafter said counsel did meet between and among themselves, on at least five separate occasions for that purpose, and

WHEREAS, on November 16, 1967 the above cases again came on for hearing on the applications for intervention;

the Court heard further oral argument and discussion by counsel for the applicants, for plaintiff, and for the defendants with respect to the proposed additional modifications in the form of final judgment; counsel for the applicants withdrew certain of the additional modifications they had proposed; and the Court recommended to counsel for plaintiff and the defendants that Section X of the form of final judgment be modified by additional language; and

WHEREAS, in accordance with the Court's recommendation plaintiff and defendants have this date orally stipulated in open Court to modify Section X of the form of final judgment so as to include as an additional paragraph at the end thereof the following:

> "Any [The word "such" was inadvertently omitted and Mr. Sarbaugh is attempting to add it.] information evidencing a violation of this Final Judgment which adversely affects the interest of any State or local governmental agency or instrumentality shall be retained by plaintiff for a period of one (1) year from the time when it is obtained and shall be treated as impounded subject to further order of this Court which, on motion and notice to the parties and a showing of good cause by the principal law officer of any State or local governmental agency or instrumentality, may order disclosure to such officer of any part or all of such information as the Court deems proper for use by such agency or instrumentality preliminarily to or in connection with an action under the federal antitrust laws."

and

WHEREAS, in consequence of the applications for intervention and the hearings held thereon, the Court on Novem-

ber 20, 1967 entered an order impounding in the custody of John E. Sarbaugh, Chief of the Midwest Office of the Antitrust Division, United States Department of Justice, certain documents then in his custody, and

WHEREAS, after permitting all applicants for intervention to be fully heard as amici curiae, the Court has considered all of the written and oral arguments and matters presented to it, and is duly advised in the premises,

THE COURT HEREBY FINDS:

1. That none of the applicants for intervention has an interest relating to the property or transaction which is the subject matter of the above cases, within the meaning of subsection (a)(2) of Rule 24 of the Federal Rules of Civil Procedure.

2. That none of the applicants for intervention is so situated that the disposition of the cases may as a practical matter impair or impede its ability to protect such an interest, even if it exists, within the meaning of that subsection of that Rule.

3. That such an interest, even if it exists, is adequately represented by plaintiff herein within the meaning of that subsection of that Rule.

4. That granting to the applicants leave to intervene would unduly delay and prejudice the adjudication of the rights of plaintiff and the defendants within the meaning of Rule 24(b) of the Federal Rules of Civil Procedure.

THE COURT HEREBY CONCLUDES:

1. That none of the applicants for intervention is entitled to intervention of right under Rule 24(a) of the Federal Rules Civil Procedure.

2. That none of the applicants for intervention is entitled to permissive intervention under Rule 24(b) of such Rules.

IT IS THEREFORE HEREBY ORDERED that all applications for intervention heretofore filed in the above cases are denied.

ENTER:

/s/ A. L. MAROVITZ,
Judge.

DATED: November 27, 1967.

APPENDIX B.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION.

UNITED STATES OF AMERICA,
Plaintiff,
v.
THE BOBBS-MERRILL COMPANY, INC.,
Defendant.
CIVIL ACTION
No. 67 C 613.

Stipulation.

It is stipulated by and between the undersigned parties by their respective attorneys, that:

1. The parties consent that a Final Judgment in the form hereto attached and filed herewith may be filed and entered by the Court at any time after the expiration of thirty (30) days following the date of filing of this Stipulation without any further notice to any party or other proceeding, either upon the motion of any party or upon the Court's own motion, provided that plaintiff has not withdrawn its consent as hereinafter provided.

2. The plaintiff may withdraw its consent hereto at any time within the said period of thirty (30) days by serving notice thereof upon the other party hereto and filing said notice with the Court.

3. In the event plaintiff withdraws its consent hereto, neither this proceeding nor the making of this Stipulation nor the filing of the attached Proposed Final Judgment

shall in any manner prejudice any consenting party in any subsequent proceedings.

Dated: October 23, 1967

For the Plaintiff

/s/ D. F. Turner
Donald F. Turner
Assistant Attorney General

/s/ William T. Huyck
William T. Huyck

/s/ Baddia J. Rashid
Baddia J. Rashid

/s/ John Edward Burke
John Edward Burke

/s/ Harry N. Burgess
Harry N. Burgess

/s/ David J. Berman
David J. Berman

/s/ John E. Sarbaugh
John E. Sarbaugh

Attorneys, Department of Justice

Attorneys, Department of Justice.

Room 2634 United States Courthouse
Chicago, Illinois 60604
353-6967

For the Defendant:

/s/ W. Donald McSweeney
W. Donald McSweeney

/s/ William A. Montgomery
William A. Montgomery

Schiff Hardin Waite Dorschel & Britton
231 South La Salle Street
Chicago, Illinois 60604
CEntral 6-4500
Attorneys for The Bobbs-Merrill Company Inc., Defendant.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION.

UNITED STATES OF AMERICA,
Plaintiff,
v.
THE BOBBS-MERRILL COMPANY, INC.,
Defendant.
CIVIL ACTION
No. 67 C 613.

At Chicago, Illinois, in said Division and District on November 27, 1967.

Final Judgment.

Plaintiff, United States of America, having filed its complaint herein on April 18, 1967, and defendant having filed its answer thereto denying the substantive allegations thereof, and plaintiff and defendant by their respective attorneys having consented to the making and entry of this Final Judgment without admission by either party in respect to any issue;

NOW, THEREFORE, before any testimony has been taken herein, without trial or adjudication of any issue of fact or law herein, and upon consent of the parties hereto, it is hereby,

ORDERED, ADJUDGED AND DECREED as follows:

I.

This Court has jurisdiction of the subject matter of this action and of the parties hereto. The complaint states claims for relief against the defendant under Section 1 of the Act of Congress of July 2, 1890, entitled "An act to

protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, as amended.

II.

As used herein:

(A) "Defendant" means the defendant The Bobbs-Merrill Company, Inc., a corporation organized and existing under the laws of Indiana, and each of its domestic subsidiaries and each of its foreign subsidiaries when doing business through or with any reseller in the United States;

(B) "Person" means any individual, corporation, partnership, firm or other legal entity and includes wherever applicable any Federal, State or local or other governmental agency or instrumentality thereof;

(C) "Customer" means any school, library or governmental agency or instrumentality thereof;

(D) "Reseller" means any person who is engaged in the business of buying books for resale and includes any such person when acting as an agent or consignee of defendant; and

(E) Solely for purposes of Section VII(A) and (B), the term "any person engaged in the resale of books purchased from defendant" shall not be deemed to include the national distributor of paperbacks who functions as defendant's sole national distributor.

III.

The provisions of this Final Judgment applicable to the defendant shall also apply to each of its officers, directors, agents and employees and to each of its succes-

sors and assigns, and to all other persons in active concert or participation with any of them who receive actual notice of this Final Judgment by personal service or otherwise. This Final Judgment shall not apply to sales for use outside the United States, except for sales to or for the use of the plaintiff or any instrumentality or agency thereof.

IV.

Defendant is ordered and directed:

(A) Within ninety (90) days after entry of this Final Judgment, to mail a copy thereof to each of its currently active wholesale accounts which sells to customers; for a period of five (5) years after such entry to mail a copy to each such additional wholesale account to whom it sells books; and to maintain for such five (5) year period a complete list of all such wholesale accounts to whom defendant has so mailed copies;

(B) To issue a written statement to the effect that this Final Judgment prohibits the defendant from fixing, determining, dictating, approving or disapproving the customers to whom or the prices at which any reseller may sell or advertise defendant's books to any school, library or governmental agency or instrumentality, the statement to be circulated by either one of the following means:

(1) By mailing, within six (6) months after entry of this Final Judgment, to the currently active list of schools, libraries and governmental agencies and instrumentalities to whom it mails catalogues; or

(2) By publication in an issue of *School Library Journal* published not later than two (2) months after entry of this Final Judgment.

(C) Within six (6) months after entry of this Final Judgment, to furnish plaintiff with a written statement of the form and manner of compliance with the provisions of subsection (B) of this Section IV;

(D) For a period of one (1) year after entry of this Final Judgment, to furnish a copy thereof to any school, library or governmental agency or instrumentality requesting it.

V.

For a period of five (5) years after the date set forth in this Section V, defendant is enjoined and restrained, in connection with the pricing of its books, except textbooks, from directly or indirectly, in any manner, using the words "net" or "net price" in or on such books or in any catalogue, price list, circular or other bulletin when referring to such books; provided, however, that this Section V shall not apply to any now-existing copies of such catalogues, price lists, circulars or other bulletins until January 1, 1968 or to now-existing copies of such books.

VI.

Defendant is enjoined and restrained from, directly or indirectly, in any manner:

(A) Fixing, determining, dictating, approving, disapproving, or policing the customers to whom, or the prices or related terms and conditions of sale at or upon which any reseller may have sold, sells, advertises or offers to sell any books to any customer;

(B) Suggesting (otherwise than by imprinting any price, without more, on a book or book jacket) to any reseller the prices or related terms and conditions of sale at which said reseller should sell, advertise or offer to sell any books to any customer;

(C) Hindering, restricting, limiting or preventing, or attempting to hinder, restrict, limit or prevent any reseller from advertising for sale, selling or offering to sell any books (1) to any customer or (2) to any customer at any price or related terms and conditions of sale individually determined by such reseller;

(D) So long as defendant sells books to resellers, refusing to sell or offer to sell or threatening to refuse to sell or offer to sell such books to, or coercing, or discriminating in the sale or shipment of any books to, any reseller because of the prices at which said reseller intends to sell or has sold any books to any customer;

(E) Inducing or suggesting to any reseller that such reseller refuse to deal with or discriminate against any third person with respect to the sale, distribution, purchase or shipment of any books to any customer; and

(F) Issuing or disseminating defendant's customer prices in any promotional material directed to resellers or in any price catalogues, lists, circulars or bulletins with respect to books sold by resellers unless such material contains a statement, in easily legible type, that any reseller is free to charge whatever price he wishes for defendant's books; provided, however, that this Section (F) shall not apply to any now-existing copies of such promotional material, catalogues, lists, circulars or bulletins until January 1, 1968.

Provided that, upon the expiration of a period of five (5) years following the date of entry of this Final Judgment, nothing contained in Section VI of this Final Judgment shall prohibit the defendant from lawfully exercising such rights, if any, or performing such obligations, if any, as it may have arising under the Miller-Tydings Act and the McGuire Act.

VII.

In addition to the prohibitions of Section VI, above, defendant is enjoined and restrained from entering into, adhering to, maintaining, enforcing or claiming any rights under any contract, agreement, understanding, plan or program with any person engaged in the resale of books purchased from defendant to:

(A) Fix, establish, maintain or adhere to prices in the sale of its books to any third person;

(B) Refuse to sell its books to any third person because of the price or prices at which, or persons to whom such third person intends to sell, advertise, or display or may have sold, advertised or displayed such books;

(C) Submit collusive or rigged bids or quotes for supplying any of its books to any third person; or

(D) Bid or quote a specific price, or refrain from bidding or quoting, on any of its books to be sold to any third person;

Provided that, subject to Section VI of this Final Judgment, nothing contained in this Section VII shall prohibit the defendant from lawfully exercising such rights, if any, or performing such obligations, if any, as it may have arising under the Miller-Tydings Act and the McGuire Act.

VIII.

Nothing contained in this Final Judgment shall be deemed to prohibit the defendant from complying with requirements imposed upon it by State or local law or by any governmental agency or instrumentality acting pursuant to State or local law.

IX.

For a period of five (5) years following the date of the entry of this Final Judgment, defendant is ordered

and directed to furnish simultaneously with each sealed bid and sealed quotation (other than a bid or quotation for a sale which will involve less than $100) submitted by it to any customer for the sale of books, other than textbooks, a written certification by the official of defendant having authority to determine the price or prices bid or quoted that said bid or quotation was not the result, directly or indirectly, of any agreement, understanding, plan, or program between defendant and any other person.

X.

For the purpose of securing compliance with this Final Judgment, and for no other purpose, duly authorized representatives of the Department of Justice shall, upon written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to defendant (which may have counsel present), made through its principal office, be permitted, subject to any legally recognized privilege, (1) access during reasonable office hours to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of the defendant relating to any of the subject matters contained in this Final Judgment, and (2) subject to the reasonable convenience of defendant, and without restraint or interference from it to interview officers or employees of the defendant, who may have counsel present, regarding any such matters; and upon such request, defendant shall submit such reports in writing, under oath if so requested, to the Department of Justice with respect to any of the matters contained in this Final Judgment as may from time to time be requested for the enforcement of this Final Judgment. No information obtained by the means provided in this Section X shall be divulged by any representative of the De-

partment of Justice to any person, other than a duly authorized representative of the Executive Branch of plaintiff, except in the course of legal proceedings to which the United States of America is a party for the purpose of securing compliance with this Final Judgment or as otherwise required by law.

Any such information evidencing a violation of this Final Judgment which adversely affects the interest of any State or local governmental agency or instrumentality shall be retained by plaintiff for a period of one (1) year from the time when it is obtained and shall be treated as impounded subject to further order of this Court which, on motion and notice to the parties and a showing of good cause by the principal law officer of any State or local governmental agency or instrumentality, may order disclosure to such officer of any part or all of such information as the Court deems proper for use by such agency or instrumentality preliminarily to or in connection with an action under the federal antitrust laws.

XI.

Jurisdiction is retained for the purpose of enabling either of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment or for the modification or termination of any of the provisions thereof, and for the enforcement of compliance therewith and punishment of violations thereof.

Dated: November 27, 1967.

ENTER:

/s/ ABRAHAM L. MAROVITZ,
United States District Judge.

APPENDIX C.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION.

UNITED STATES OF AMERICA, *Plaintiff*, *v.* THE MACMILLAN COMPANY, *Defendant.*	CIVIL ACTION. No. 67 C 622. Equitable Relief Sought.

Complaint.

(Filed April 18, 1967.)

The United States of America, by its attorneys, brings this action against the above-named defendant and alleges as follows:

I.

JURISDICTION AND VENUE.

1. This complaint is filed under Section 4 of the Act of Congress of July 2, 1890, as amended (15 U. S. C. § 4), commonly known as the Sherman Act, in order to prevent and restrain continuing violations by the defendant, as hereinafter alleged, of Section 1 of that Act (15 U. S. C. § 1).

2. Defendant The Macmillan Company maintains offices and transacts business within the Northern District of Illinois.

II.

Definitions.

3. The term "children's books" shall mean "juveniles" as generally understood in the publishing industry, referring to books designed for use by children of elementary and secondary school age.

4. "Library editions" shall mean children's books in reinforced bindings sold primarily to schools and libraries, or children's books which have a "net price."

5. The term "wholesaler" shall mean any person or company which buys library editions of children's books from publishers and resells them to schools, libraries, governmental bodies, or bookstores.

III.

The Defendant.

6. The Macmillan Company (hereinafter referred to as "Macmillan") is hereby made a defendant herein. Macmillan is a corporation organized and existing under the laws of the State of Delaware with its principal place of business in New York, New York. During the period of time covered by this complaint, Macmillan engaged in the production and sale of library editions of children's books throughout the United States.

IV.

The Co-Conspirators.

7. Various companies and persons not made defendants herein participated as co-conspirators with the defendant in the combination and conspiracy charged herein and performed acts and made statements in furtherance of said offense. Said co-conspirators include numerous wholesalers located throughout the United States.

V.

Nature of Trade and Commerce.

8. Schools, libraries, and governmental bodies purchase over $100,000,000 worth of children's books per year of which library editions comprise sales of approximately $40,000,000. This represents the major part of the total sales of children's books in the United States. Most of these purchases are made with public funds expended by State and local governments and by the Federal Government. Substantial amounts of federal funds are made available to State and local governments for the purchase of children's books.

9. Schools, libraries, and governmental bodies purchase children's books from wholesalers and directly from publishers, including defendant Macmillan; wholesalers and publishers solicit many of the same customers in their efforts to sell children's books.

10. Traditionally, schools, libraries, and governmental bodies have benefited from competition among wholesalers and publishers in the granting of discounts on purchases of children's books. Many schools, libraries, and governmental bodies buy children's books by means of competitive bids.

11. In recent years, publishers and wholesalers have classified certain children's books as "library editions" and have sold such books, without discount, at uniform "net prices" to schools and libraries.

12. Defendant Macmillan has produced library editions and has established "net prices" on these editions. Its sales of Macmillan library editions in 1965 exceeded $1,000,000.

13. During the period of time covered by this complaint, defendant Macmillan sold and shipped substantial

quantities of library editions of children's books in interstate commerce to customers located in States other than the States from which said children's books were shipped.

VI.

Offenses Charged.

14. Beginning at least as early as 1961, the exact date being to the plaintiff unknown, and continuing thereafter until the date of the filing of this complaint, the defendant and co-conspirators engaged in an unlawful combination and conspiracy in restraint of the aforesaid interstate trade and commerce in library editions of children's books in violation of Section 1 of the Sherman Act, as amended (15 U. S. C. § 1).

15. The aforesaid combination and conspiracy consists of a continuing agreement, understanding, and concert of action among the defendant and the co-conspirators to fix, maintain, and stabilize prices on Macmillan library editions.

16. During the period of time covered by this complaint, the defendant has entered into a series of contracts in restraint of the aforesaid interstate trade and commerce in library editions of children's books in violation of Section 1 of the Sherman Act, as amended (15 U. S. C. § 1).

17. The aforesaid contracts consist of agreements between the defendant and each of the co-conspirators to fix, maintain, and stabilize prices on Macmillan library editions.

18. Pursuant to and in effectuation of the aforesaid combination and conspiracy, and the aforesaid contracts, the defendant and co-conspirators did those things which, as hereinbefore alleged, they agreed to do. Said offenses will continue unless the relief hereinafter prayed for is granted.

VII.

Effects.

19. The aforesaid combination and conspiracy and the aforesaid contracts have had, among others, the following effects:

(a) Prices of Macmillan library editions have been fixed, maintained, and stabilized at high, artificial, and noncompetitive levels;

(b) Price competition between defendant and the co-conspirators, and price competition among the co-conspirators, in the sale of Macmillan library editions has been suppressed and eliminated; and

(c) Schools, libraries, and governmental bodies have been deprived of the benefits of competitive bids and discounts in the sale of Macmillan library editions.

Prayer.

Wherefore, plaintiff prays:

(A) That the Court adjudge and decree that the defendant and co-conspirators have unreasonably restrained the aforesaid interstate trade and commerce in children's books, as hereinabove alleged, in violation of Section 1 of the Sherman Act.

(B) That the defendant, its successors, assignees, and transferees, and the officers, directors, agents, and employees thereof, and all other persons acting or claiming to act on behalf thereof, be perpetually enjoined and restrained from, in any manner, directly or indirectly, continuing, maintaining, or renewing the aforesaid offenses and from engaging in any other combination, conspiracy, contract, agreement, understanding, or concert of action having a similar purpose or effect and from adopting or following any practice, plan, program, or device having a similar purpose or effect.

(C) That defendant, its officers, directors, agents, and employees, and its successors, assignees, and transferees, and all persons acting or claiming to act on behalf thereof, be perpetually enjoined from:

(1) Using the term "net" or "net price" in connection with any catalogue, price list, circular, or other announcement concerning its books;

(2) Suggesting prices at which its books are to be resold by any purchaser thereof;

(3) Refusing to sell, or delaying shipments, or misdirecting shipments or discriminating in any way, or threatening to refuse to sell or delay shipments or misdirect shipments or discriminate in any way against any purchaser of its books because of the prices at which said purchaser resells or offers to resell defendant's books; and

(4) Restricting, limiting or preventing or attempting to restrict, limit or prevent any person from selling or offering to sell any books at any price, or upon any terms or conditions as such person may individually determine.

(D) That defendant, its officers, directors, agents, and employees, and its successors, assignees, and transferees, and all persons acting or claiming to act on behalf thereof, be ordered to notify in writing (1) all of its wholesaler customers that they may resell its books at any price they may choose and (2) all of the schools, libraries, and governmental bodies whom defendant solicited during the past four years that defendant does not in any way attempt to restrict or limit any person from selling or offering to sell its books at any price, or upon any terms or conditions as such person may individually determine.

(E) That the Court order defendant to annex to every sealed bid or quotation on books a written certification by

an officer of defendant, or by the official of defendant having authority to determine the bid or quotation involved, that said bid or quotation was not the result of any agreement, understanding, or communication between the defendant and any publisher, wholesaler, or other competitor.

(F) That defendant be enjoined from quoting published or "list" prices, or any other price mathematically determinable by its competitors from the pattern of prices previously quoted by defendant, in sealed bids covering books to federal, state, or local governmental bodies, or to schools or libraries, where the value of books to be purchased pursuant to such bid exceeds $100,000.

(G) That the plaintiff have such other and further relief as the nature of the case may require and the Court may deem just and proper.

(H) That the plaintiff recover the costs of this action.

Dated: April 18, 1967.

RAMSEY CLARK
Ramsey Clark
Attorney General

DONALD F. TURNER
Donald F. Turner
Assistant Attorney General

GORDON B. SPIVACK
Gordon B. Spivack

JOHN E. SARBAUGH
John E. Sarbaugh
Attorneys, Department of Justice

EDWARD V. HANRAHAN
Edward V. Hanrahan
United States Attorney.

WILLIAM T. HUYCK
William T. Huyck

JOHN EDWARD BURKE
John Edward Burke
Attorneys, Department of Justice.
Room 2634,
United States Courthouse,
Chicago, Illinois 60604
353-6967

APPENDIX D.

Nov. 8, 1967

Honorable Ramsey Clark
Attorney General
Department of Justice
Washington, D. C.

Dear General Clark:

Re: *Price Fixing Conspiracies Relative to Library Books*

It has come to my attention that the Department is completing prosecutions of eighteen publishers of library books and that consent decrees against those publishers are now being considered. (*U. S. v. Harper and Row Publishers, Inc.*, U. S. D. C., N. D. Ill., Eastern Division, #67 C 612 et seq.) I am one of several Attorneys General representing states which have filed treble damage suits against substantially the same defendants. In fact, Michigan, along with West Virginia, Massachusetts, Texas, and Wisconsin, now has pending in the Chicago court a motion for leave to intervene in the Department's civil suits against the library book publishers, for the purpose of objecting to entry of consent judgments in the form presented to the court, and to protect the interest of the public as represented in the treble damage actions pending on behalf of our states' taxpayers. Michigan is particularly interested in protecting the work product of the Department's suit, since it was in substantial part developed by Senator Philip A. Hart, of Michigan, in hearings of the Antitrust Committee of the Senate, and made available to the federal grand jury.

The result of the conspiracy or conspiracies involved consisted of substituting library editions for trade editions sold to libraries and schools, and by this and other means eliminating previous trade discounts ranging from ten to forty percent. (Some of us who have been investigating this feel that the average loss of discount approximates 33⅓%, but we cannot state from our present knowledge how close this comes to the actual damages resulting therefrom.)

The practices which are the subject of your prosecutions and of your civil action significantly affect a substantial portion of school districts and public libraries in states throughout the nation. As you know, under Title II of the Elementary and Secondary Education Act of 1965, more than one hundred million dollars of federal money is made available to the states each year for improving school libraries, and this is only one source of funds allegedly overcharged by the conspiracy which is the subject of the litigation. Substantially all of these, and other public funds such as federal library funds, are affected by the conspiratorial diminution or elimination of trade discounts to public schools and libraries. The effectiveness of at least two major federal programs was, therefore, diminished.

In addition to the five states and numerous local municipalities which have already filed treble damage suits based on the above alleged conspiracy, other states contemplate filing similar actions. Therefore, I feel that the federal government has a significant interest in seeing that as many public agencies as possible, including the states, recover overcharges to their taxpayers resulting from the conspiratorial practices referred to. I therefore urge you to give all appropriate aid to any interested state to achieve this end.

It is appropriate in this connection that I call your attention to a resolution adopted by the National Association of Attorneys General, of which I am currently president, at its anual meeting on August 30, 1967, relative to the increasing public need for more effective antitrust enforcement by the states, and the necessity of developing better cooperation between the Department of Justice and the states as well as among the states. I write this letter as Attorney General of the State of Michigan rather than as President of the Association, of course, but forward for your attention a copy of the resolution referred to as germane to the subject being discussed.

Specifically, I request that you consider the following actions:

1. Insist on including in the consent decrees an "asphalt clause" which would protect the interests of the public money purchasers injured by the conspiracies.

2. Conducting in the Department of Justice a seminar or symposium for attorneys representing the Attorneys General of the several states and other units of government to give them the benefit of the know how and work product of these employees of the Department of Justice who have worked on this matter.

We realize that the filing of these cases was preceded by a grand jury investigation and that the transcript of grand jury proceedings or any part of it cannot be revealed without a court order. However, except for this, the know how and work product of your attorneys and economists can be made available and it seems to us it should. Especially with costs of government and taxes rising to a point of national emergency, we can see no reason why legal and economic work already completed by federal employees

should be needlessly duplicated by state employees, which will be the case if the federal work product is not made available to the states. It is in the common interest of the federal and state governments to avoid such waste.

Your earnest consideration of these proposals will be greatly appreciated.

Yours sincerely,

FRANK J. KELLEY,
Attorney General
of Michigan.

Enclosure
FJK:cc

APPENDIX E.

Resolution adopted by: 61st Annual Meeting
National Association of Attorneys General
August 30, 1967
Portland, Oregon

IX. Cooperative Action in Price-Fixing Conspiracies

Whereas the various states, their agents and subdivisions have been the victims of numerous price-fixing conspiracies which are commonly regional or national in nature and involve interstate commerce; and

Whereas since our last meeting various state Attorneys General either have maintained cases to recover treble damages on overcharges made to public agencies within their states pursuant to such conspiracies or have had reported to them by reliable sources the existence of such conspiracies in at least 22 interstate industries; and

Whereas the recoveries achieved in such cases have resulted in significant relief to state and local taxpayers and constitute a substantial means of enforcing the federal antitrust laws; and

Whereas few if any state Attorneys General either have or can get sufficient personnel adequately to investigate and prepare antitrust cases in as many as 20 or more industries before the statutes of limitations run on them; and

Whereas most such treble damage suits brought by states, their agencies and subdivisions, are based at least

in part on investigations and prosecutions brought by the United States; and

WHEREAS many such treble damage suits based upon the same conspiracy are commonly joined for discovery and pre-trial purposes pursuant to the new federal rules and practices relating to multiple litigation; and

WHEREAS past experience has demonstrated that many efficiencies, benefits and economies can be achieved by cooperation among states interested in asserting claims for treble damages resulting from the same interstate price-fixing conspiracy;

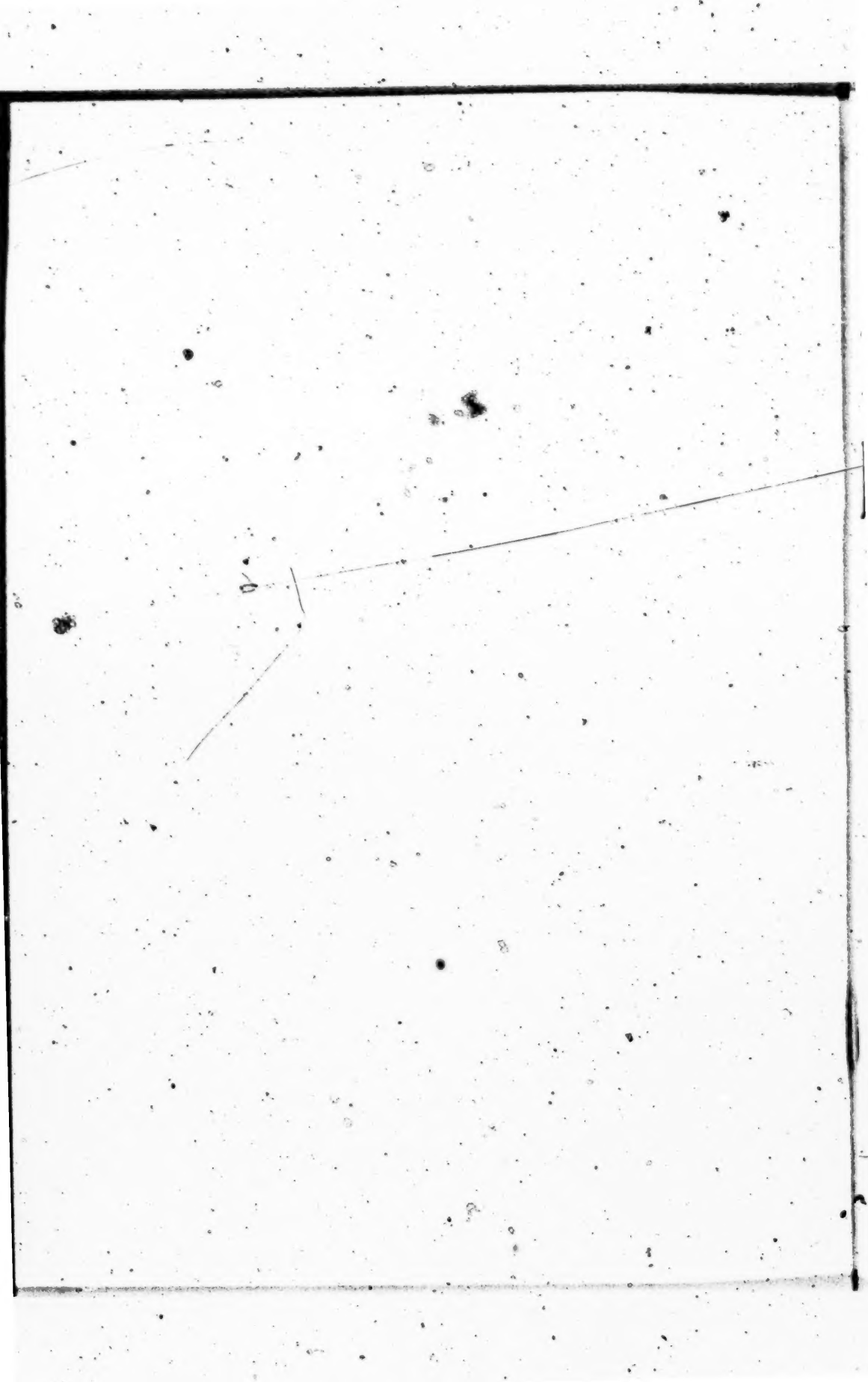
NOW, THEREFORE, BE IT RESOLVED by the 61st Annual Meeting of the National Association of Attorneys General in Portland, Oregon that the Antitrust Committee of this Association be directed to make a recommendation to this Association as soon as is feasible on the following matters:

1. Ways and means of improving the cooperation between the several states and the federal government in this field;

2. Ways and means of improving the cooperation among the states in this field;

3. Ways and means of cooperating with quasi-public agencies such as the National Institute of Municipal Law Officers (NIMLO) in such matters; and

4. Desirable and feasible uses of the class action and the doctrine of parens patriae in such matters.



SUPREME COURT, U. S.

No. 1141 and No. 1146

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

CITY OF NEW YORK ET AL.,
Appellants,

vs.

UNITED STATES OF AMERICA ET AL.,
Appellees.

SCHOOL DISTRICT OF PHILADELPHIA ET AL.,
Appellants,

vs.

UNITED STATES OF AMERICA ET AL.,
Appellees.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

MOTION TO AFFIRM

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IN THE

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No. 1141

CITY OF NEW YORK et al.,

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ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

MOTION TO AFFIRM

Pursuant to Rule 16.1(c) of the Rules of this Court, appellees (other than the United States of America, which is moving separately) move that the order of the United States District Court for the Northern District of Illinois denying intervention in *United States of America* v. *Harper & Row, Publishers, Inc.*, Civil Action No. 67 C 612 and in seventeen related cases, Civil Action Nos. 67 C 613 through 67 C 629, be affirmed.

STATEMENT

These appeals are from an order of the district court entered on November 27, 1967 which denied appellants' motions to intervene under Rule 24 of the Federal Rules of Civil Procedure in eighteen separate but related cases against the defendant publishers.

On April 18, 1967 eighteen complaints were filed by the Antitrust Division of the Department of Justice in the district court alleging that each respective defendant publisher of library editions of children's books had violated the Sherman Act by efforts to maintain wholesalers' resale prices for such books. There was no allegation of horizontal price fixing among the publishers. In each case, the defendant publisher filed an answer generally denying the allegations of the complaint. No testimony or discovery was taken in any case. There were no criminal indictments of the publishers for allegedly engaging in such resale price maintenance.

The appellants here were not parties to the Government cases. Appellants are states and cities, most of which, either before or after the denial of intervention, instituted private actions seeking treble damages and, in some instances, injunctive relief against the publishers.

From the time that the Government cases were instituted on April 18, 1967 until October, 1967, the Government and the defendants were continuously engaged in negotiating a form of consent judgment, for entry in all eighteen cases, which would most expeditiously afford the public the injunctive relief that was the object of the Government actions, without the burden and expense of eighteen trials. On October 23, 1967, the parties filed stipulations embodying their agreement on a proposed consent judgment.

In conformity with the usual practice followed by the Antitrust Division in such cases since 1961, the stipulations provided that the Department of Justice could withdraw its consent to the proposed judgments at any time during a thirty-day period in which interested persons could submit their views to the Antitrust Division. As stated in its published "Consent Judgment Policy," 28 Code Fed. Reg. § 50.1 (1967), the Antitrust Division, during such thirty-day periods, will "receive and consider any written comments, views or relevant allegations" which may indicate that a proposed judgment is "inappropriate, improper or inadequate."

On November 2, 1967 the State of Illinois filed an application for leave to intervene in the eighteen cases in the court below in order to object to entry of the proposed consent judgments. The only quarrel with the consent judgments raised by the application was that they did not contain limited admissions of liability (Application of State of Illinois, p. 15)—i.e., so-called "asphalt clauses" (See pp. 12, 16-17 *infra*). A number of additional such applications followed.

All of the intervention applications were heard on November 13, 1967 by District Judge Abraham L. Marovitz, to whom the Government's eighteen cases had been assigned from their inception. At that hearing, the Government (speaking through the Chief of the Midwest Office of the Antitrust Division) informed the court that the proposed decrees were "very strong" and "comprehensive in their coverage" (Transcript of Hearing, Nov. 13, 1967, p. 63). The Government spokesman went on to say that he assumed that the applicants for intervention were satisfied with the substance of the decrees and added that (*id.* at p. 64):

> "They [applicants] have been aware that we have been negotiating consent decrees since at least the middle of the summer and, to my knowledge, no such constructive suggestions have been made by any states or cities that would be helpful to us in negotiating these decrees."

Earlier in the hearing, the principal spokesman for the applicants conceded that they had not "really attacked the consent order" (*id.* at p. 18). During his rebuttal argument that afternoon, however, he stated that "at lunch" he and some of his colleagues had decided to consider urging substantive changes in the judgments after all (*id.* at p. 127). The applicants then made four such suggestions:

1. The judgments should require the defendants to make all books available in the less-expensive "trade edition" bindings as well as in the more-expensive library bindings (because the defendants had allegedly withheld trade editions in order to force customers to purchase library editions) (*id.* at at pp. 127-128);

2. The judgments should require some kind of compulsory, royalty-free licensing of the copyrights involved in the books which were the subject of the complaints (*id.* at p. 130);

3. The judgments' prohibition against use of the term "net price" should apply to textbooks (which were expressly excepted from this prohibition as contained in Section V of the judgments) (*id.* at p. 131); and

4. The judgments should contain a requirement, in addition to the usual visitorial provisions, that the Antitrust Division must disclose to states, cities and other governmental agencies all information obtained from the defendants through use of the visitorial provisions (*id.* at pp. 144-146).

Notwithstanding his serious doubts about the timeliness of these suggestions (*id.* at pp. 128-129), Judge Marovitz treated the applicants for intervention on an *amici curiae* basis and urged the parties to discuss the four suggestions and report back to him a few days later (*id.* at pp. 159-162). Government counsel urged the applicants to provide the Government with any evidence they might have which would support their suggestions (*id.* at p. 163).

The attorneys for the Antitrust Division then held *five* meetings with respect to these four "suggestions": one meeting with the applicants for "clarification" of what was intended by the suggestions and to ascertain whether the applicants had any evidence to support their proposed changes; a second meeting, with defense counsel to try to explain these suggestions and to receive defense counsel's reactions; a third meeting, with applicants to give the Antitrust Division's views of the suggestions; a fourth meeting, with defense counsel, to explain the Antitrust Division's views; and a fifth meeting, among all the parties and the applicants (Transcript of Hearing, Nov. 16, 1967, pp. 3-5).

In the course of these meetings, the applicants dropped the second and third of their four suggestions, relating to copyright licensing and to use of the term "net" in connection with textbooks. It was explained to the applicants that it would be impossible to incorporate copyright provisions in the judgments since copyrights involve the rights of *authors*, who were not parties to the proceedings. With respect to applicants' objection to exempting textbooks from the prohibition against using the term "net price", it was explained that the "net pricing" of textbooks resulted from *state* requirements. The applicants' principal spokesman was frank to admit that "my only problem there, as I expressed it to the Court, was a

failure to understand it." (Transcript of Hearing, Nov. 16, 1967, pp. 10-12.)

The fourth suggestion, seeking access to any material obtained by the Antitrust Division under the visitorial provisions of the judgment "just by calling the Government," was reduced to a request for impounding for one year any documents obtained by the Division under such visitation rights. As revised with the concurrence of the applicants and with access subject to further court order, the parties agreed to the addition of a paragraph to Section X of the proposed consent judgments (*id.* at pp. 13-14; see Jurisdictional Statement in No. 1141, p. 8c).

The rest of the hearing on November 16, 1967 (Transcript, pp. 16-65) was devoted to applicants' suggestion that the defendants be compelled to publish and have available the same book in several types of bindings, "economic feasibility notwithstanding" (*id.* at p. 42)—a suggestion which forms the basis for an issue urged here by appellants in No. 1141 (Jurisdictional Statement, at pp. 6, 8n. 5a, 16, 25). Counsel for applicants admitted that no one had furnished evidence that any publisher had ever held back books in less expensive bindings (Transcript of Hearing, Nov. 16, 1967, p. 18).

It was pointed out that it would be impractical to compel a defendant to publish the same book in a variety of bindings since this would result in the trial judge's "running the book business" by deciding how many books each publisher should publish in each type of binding (*id.* at pp. 28-33, 44, 47-52). After stating that the Government had "no information to support this charge" (relating to the availability of trade editions) (*id.* at p. 5), Government counsel went on to say that one of counsel for the applicants for intervention "thought he had some facts in his files * * * that would support this" (*ibid.*).

The promised information was not forthcoming, as Government counsel confirmed when the eighteen consent judgments, as modified, were handed up to Judge Marovitz for signature on November 27th (Transcript of Hearing, Nov. 27, 1967, p. 3):

> "With regard to one pending suggestion that was made by the petitioners for intervention with regard to modifying this decree, this was the suggestion that the publishers be required to make trade editions of books available if they have them.
>
> "With regard to this, we have received no further information from these petitioners, so that we still have no information that publishers ever engaged in such a practice."

In entering the decrees, Judge Marovitz said (*id.* at pp. 4-5):

> "I do appreciate the cooperation of all of you in endeavoring to strengthen the decree, in conformity with some of the suggestions made by the amicus in this case.
>
> "I don't see anybody representing them here so I assume they are satisfied with the entry of the decrees."

Simultaneously with entry of the decrees, Judge Marovitz signed a separate order denying the applications for intervention but reciting that all applicants had been permitted to be "fully heard as amici curiae" (Jurisdictional Statement in No. 1141, pp. 1b-5b).

All of the applicants for intervention have appealed at Nos. 1141 or 1146, except the Mayor and City Council of Baltimore and the Board of Education of Chicago.

ARGUMENT

Introduction

The district court's denial of intervention was clearly correct and should, we submit, be affirmed. The appellants have given no cogent reasons, and certainly have cited no authority, to demonstrate that plenary review of the decision below is in any way warranted.

The decision below is correct because:

(1) The basic relief appellants actually seek—an admission of liability by the defendants—is diametrically opposed to the congressional policy of encouraging consent decrees as expressed in Section 5(a) of the Clayton Act; and

(2) As a matter of law, an outside person has no interest sufficient to support intervention in proceedings culminating in the pre-trial entry of consent judgments negotiated by the Government and the defendants, particularly where the outsider's purpose is solely to demand admission of liability by defendants. See *United States* v. *Blue Chip Stamp Co.*, 272 F. Supp. 432 (C.D. Cal. 1967), *aff'd sub nom. Thrifty Shoppers Scrip Co.* v. *United States*, 389 U. S. 580 (1968).

I.

Appellants' demand for admission of liability in consent judgments is contrary to the express proviso to Section 5(a) of the Clayton Act.

The jurisdictional statements demonstrate that appellants' actual reason for seeking intervention is to urge that the consent judgments were improperly entered because they include "no admissions of the violations charged" (Jurisdictional Statement in No. 1141, p. 3).[1]

This demand flies squarely in the face of declared congressional policy as specifically enacted in the proviso to Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a). The proviso directs "that this section shall not apply to consent judgments or decrees entered before any testimony has been taken," and accordingly such a negotiated consent judgment may not be "prima facie evidence * * * in any action or proceeding brought by any other party" for treble damages, as otherwise provided in Section 5(a). This long-standing enactment (passed in 1914) was clearly designed by the Congress to encourage negotiated pretrial settlements of antitrust cases.[2] Its proviso has been praised and used consistently by each succeeding Assistant Attorney General in charge of the Antitrust Division. The current Assistant Attorney General recently and forcefully summarized the considerations justifying the

[1] The Jurisdictional Statement in No. 1146, at page 4, restates the same proposition by urging that the district court erred by not insisting that the consent judgments contain "limited admissions * * * of violations * * * of the Sherman Act * * *."

[2] For a comprehensive review of the legislative history of § 5(a) see *Twin Ports Oil Co.* v. *Pure Oil Co.*, 26 F. Supp. 366 (D. Minn. 1939), *aff'd*, 119 F. 2d 747 (8th Cir.), *cert. denied*, 314 U. S. 644 (1941).

proviso in an address before The Association of the Bar of the City of New York, as follows:

> "For a long time, the settlement of antitrust cases by negotiated consent decrees has been a major factor in antitrust enforcement. From 70 to 75% of civil antitrust cases end up in a consent judgment, most before litigation, some after the Government has secured an adjudication of liability.
>
> "The values served by negotiated settlement are obvious and great. Consent decrees save time and expense for the defendants and the Government, and are a blessed relief to our over-burdened courts. The savings to the Government multiply by many times what can be accomplished with any given amount of inevitably limited enforcement resources. Quick resolution of the issues raised by antitrust attack relieves defendants of the years of costly uncertainty that unresolved litigation imposes on critical business decisions.
>
> "The values to the Government of settlement were early recognized. In enacting Section 5 of the Clayton Act in 1914, making an adjudication of liability in a Government action *prima facie* evidence of liability in any subsequent case brought by a private plaintiff, Congress excepted consent decrees entered before final judgment from the operation of that section for the express purpose of saving the Government needless litigation expense by encouraging defendants to settle. At the same time and for the same reason, *nolo* pleas in criminal cases were excepted from the operation of Section 5. Reconsideration of the latter point is in order. For reasons which I will not restate here, The Department of Justice has given its support to proposed legislation that would bring *nolo* pleas within Section 5. But we have vigorously opposed a simultaneous proposal to make consent decrees evidence of liability in private litigation, for we strongly believe that the damage to

> effective antitrust enforcement that such a proposal would entail would far exceed any possible gain." Turner, "Antitrust Consent Decrees: Some Basic Policy Questions," reported in BNA Antitrust & Trade Reg. Rep., Dec. 19, 1967, p. X-1.

A year earlier, testifying as to the position of the Department of Justice before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, General Turner expressed the Department's opposition to a proposal to amend Section 5(a) of the Clayton Act so as to make consent decrees prima facie evidence in private treble damage suits. He said [*Hearings Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary on S.2512,* 89th Cong., 2d Sess. 86-87 (1966)]:

> "• • • The consent decree program has aided the Government considerably in its efforts to protect competition.• • • While we believe it desirable to provide private plaintiffs with the benefits of Federal enforcement efforts, any benefits secured must be weighed against possible injury to our enforcement program. It is unclear how this proposal will benefit private parties. And, in view of the risk of impairing a vital enforcement technique, we believe it inadvisable to enact a provision giving consent decrees prima facie evidentiary effect."

In answer to a question by the subcommittee chairman, Senator Hart, General Turner said (*id.* at p. 88):

> "• • • I think we get quite significant injunctions and other forms of relief in the consent decree and in view of the enormous saving in resources, it multiplies our efforts. That is, we can get about five times as much mileage out of any group of people through heavy use of the consent decree program than we otherwise could. And I am convinced

> myself that in a good many instances we may well get out of consent decrees, particularly in view of the immediacy of the relief, instead of having to wait for 3 to 5 years, better results than we do going to litigation."

The subcommittee's chief counsel asked General Turner about use of "asphalt" clauses (*id.* at p. 88). General Turner commented (*id.* at p. 90):

> "• • • to compel the Government to insist upon admissions of fact pertaining to guilt would, I believe, seriously discourage people from entering into consent decrees, and I think that would be a very serious blow."

General Turner reiterated these views in a letter written in response to an inquiry by Congressman Celler, Chairman of the House Judiciary Committee, reported in BNA Antitrust & Trade Reg. Rep., March 21, 1967, pp. X-1 to 3.

Thus, the Congress has been presented with a clear choice: to give additional aid to private litigants by abandoning the policy which encourages consent decrees by exempting them from the prima facie effect of Section 5(a) and thereby incur what General Turner characterized as "the risk of impairing a vital enforcement technique" (*Hearings, supra* at p. 86); or to continue the policy in view of its strong support by the Government official having primary responsibility for antitrust enforcement. This is a legislative choice, necessarily involving consideration of the resources made available to the Antitrust Division for its enforcement efforts.

To date, the Congress has not chosen to change the existing policy of encouraging consent decrees. The bill which was the subject of the Senate subcommittee hearings in 1966 (S.2512, 89th Cong., 2d Sess.) was not re-

ported out of committee. Senator Hart reintroduced the bill in the 90th Congress a year ago [S. 1538, 90th Cong., 1st Sess.; see 113 Cong. Record S5020-S5021 (daily ed. April 13, 1967)]. There has been no action on that bill to date.

It is significant to note that two of the witnesses who testified before the Senate subcommittee in 1966 in favor of S.2512 are representing some of the appellants here,[3] a circumstance which places them in the questionable position of urging this Court to do the very thing which they have been unable to persuade the Congress to do.

The value of this policy of encouraging consent decrees is graphically illustrated by the disposition of the present cases. Eighteen civil antitrust cases were expeditiously disposed of within six months after the complaints were filed. The relief contained in the judgments is sweeping: the complaints related solely to publisher resale price maintenance of library editions of children's books, but the broad injunctive language relates to "any books" (Section VI) or simply "books" (Section VII); the injunctive language used prohibits any form of resale price maintenance, directly [Section VI (A)] or by suggestion [Section VI (B)] or by indirection [Sections VI (C), (D), (E) and (F)]; and Section VII, for good measure, picks up any conceivably related contract, agreement or understanding.[4] It is thus clear that the public interest has been completely protected by the consent judgments. Appel-

[3] Mr. Alioto (*Hearings, supra* at pp. 45-56) is on the Jurisdictional Statement in No. 1141. Mr. Kohn (*id.* at pp. 22-30), although not on the Jurisdictional Statement in No. 1146 is one of the attorneys of record for the same parties in their capacity as plaintiffs in *School District of Philadelphia* v. *Harper & Row Publishers, Inc.*, Civil Action No. 40,537 (E. D. Pa.).

[4] The judgment in No. 67 C 612 is reproduced at pp. 1c-9c of the Jurisdictional Statement in No. 1141. The judgments in the other cases are virtually identical.

lants' belated attempts to criticize the substantive provisions of the judgment are obvious quibbles. (See Statement, pp. 4-7 *supra*).

The defendant publishers clearly advised the representatives of the Antitrust Division during the course of the negotiations that they would not forego the inducement specifically provided in Section 5(a) of the Clayton Act and, therefore, that they would not consent to sweeping injunctions if it were also demanded that they admit liability for any purpose.

"Needless litigation" was thus avoided "by encouraging defendants to settle" (Turner, *op. cit. supra*) as contemplated by Section 5 (a) of the Clayton Act. The length of time which would have been required to prepare and try eighteen separate, substantial antitrust cases and obtain broad final injunctive relief in each of them—even assuming the Government could have fully sustained its allegations—will be obvious to this Court.[5] Equally apparent is the monumental expense that the Government and the defendants would have incurred had such litigation been necessary.

Appellants, as noted, are not parties to these cases. They seek to obtain treble damages, and in some cases injunctive relief, in other proceedings under the antitrust laws. Their sole reason for seeking intervention here is to demand admissions of liability which might aid their private claims. So viewed, appellants' contentions on this appeal are nothing more than an expression of dissatisfaction with the congressional policy embodied in

[5] The Government was by no means ready to go to trial in any of the eighteen cases. Substantial discovery was contemplated by the Government. See Transcript of Hearing, July 31, 1967, p. 5. A recent note points out that the average time required to obtain a litigated judgment is five years. Note, *Flexibility and Finality in Antitrust Consent Decrees*, 80 Harv. L. Rev. 1303, 1305 (1967).

the proviso to Section 5(a) of the Clayton Act. Appellants would obviously prefer that the proviso simply not exist. The fact is, however, that the proviso does exist; the fact is that its policy is salutary and has been long recognized as such; and the fact is that this expressed congressional policy has been applied here.

We respectfully submit that appellants' dissatisfaction with the statute would be more appropriately addressed to the Congress than to this Court. As the court declared in *United States* v *Brunswick-Balke-Collender Co.*, 203 F. Supp. 657, 662 (E.D. Wisc. 1962):

> "No one can question but what it was also the intent of Congress in enacting § 5 to aid treble damage claimants in the prosecution of their suits. When that section is read in full, however, it is most clear that the benefits to treble damage claimants come into being and inure to them *only when defendants have failed to take advantage of the inducement offered in that section.*
>
> "It may well be that Congress itself may wish to re-examine the proviso in § 5. And it may well be that after re-examination, Congress would subordinate its present expressed policy of inducing early compliance with the antitrust laws without protracted litigation to the interests of treble damage claimants. This, of course, is a matter for Congress to decide. *However, until Congress so acts, its present express policy should not be subverted by the adoption and imposition of a policy that would thwart the ends sought to be attained by Congress.*" (Emphasis added.)

To the same effect are: *United States* v. *Ward Baking Co.*, 376 U. S. 327, 334 (1964); *United States* v. *Carter Products, Inc.*, 211 F. Supp. 144, 148 (S.D.N.Y. 1962); *Twin Ports Oil Co.* v. *Pure Oil Co.*, 26 F. Supp. 366, 374 (D. Minn.

1939), *aff'd*, 119 F. 2d 747 (8th Cir.), *cert. denied*, 314 U. S. 644 (1941). Unless and until the Congress should repeal or amend the proviso to Section 5(a) of the Clayton Act, we submit that the courts should continue to permit the executive branch of the Government to use its discretion in implementing the proviso in the interest of achieving efficient and effective antitrust enforcement.

II.

Appellants' arguments for ignoring the clear congressional mandate of Section 5(a) are spurious.

1. The "asphalt clause" argument.

Appellants rely heavily on the fact that once, in fifty-four years of consent judgment history, the Department of Justice apparently requested, and one group of defendants voluntarily agreed to, some kind of admission that they violated the Sherman Act. *United States* v. *Lake Asphalt & Petroleum Co.* and related cases, CCH. Trade Reg. Rep. (1960 Trade Cas.) ¶¶ 69,835, 69,878, (1961 Trade Cas.) ¶ 69,923 (D. Mass. 1960). Those cases involved allegations of horizontal price fixing and bid rigging in sales of asphalt, road tar and bituminous concrete.[6]

Contrary to the assertion by appellants in No. 1141 (Jurisdictional Statement, pp. 10-11), the Government has never made insistence on an asphalt clause an "integral part" of its enforcement policy. Whatever may have caused the Government to seek the admissions in the asphalt cases is not part of the public record. Nor does it

[6] It is noteworthy that there, criminal cases were initiated by the Government, a factor not present here. *United States* v. *Lake Asphalt & Petroleum Co.* and related cases, Cr. Nos. 165-M, 166-M, 167-M (D. Mass.)

appear why the defendants voluntarily made such admissions. Here, the defendants refused to do so, and the Government concluded not to press the issue. The asphalt cases clearly cannot be cited for the proposition that defendants must admit a violation of law before the court can approve a consent judgment—or even that a district court should, under any circumstances, require such an admission when the Government has not insisted on it. The mere statement of such a proposition is its own refutation, especially when it is contrasted with the precisely opposite command in the proviso to Section 5(a) of the Clayton Act.

Congressional policy has been expressed with unusual clarity in Section 5(a). The fact that *once* in history—at a different time, in a different case, under different circumstances—*both* the Government and all parties *chose voluntarily* to waive the proviso, is no warrant for adopting the appellants' position that this Court should now judicially repeal the legislative policy embodied in the proviso.

2. The *nolo contendere* pleas argument.

Appellants also attempt to rely on criminal cases in which the courts have rejected pleas of *nolo contendere*. Whatever may be the governing factors in criminal proceedings involving *punishment for past offenses*, we submit that the policy considerations are vastly different in civil proceedings under Section 4 of the Sherman Act seeking only injunctive relief relating to *future* conduct. The Assistant Attorney General in charge of the Antitrust Division has clearly perceived and articulated this distinction (See pp. 10-12 *supra*).

3. The public or quasi-public bodies argument.

Appellants seek to avoid the impact of the proviso to Section 5(a) of the Clayton Act by contending that the proviso should be suspended or ignored when the aspiring intervenors are public or quasi-public bodies rather than private parties. Had the Congress intended any such differentiation among litigants, it could easily have expressly said so. The Congress not having done so, there is surely no justification for appellants' position that the courts should make such a differentiation.

Moreover, and signally, there is no more necessity to encourage states and municipalities to institute private treble damage actions than there is to induce private parties to do so. This is especially true where, as here, the size and strength of the appellants far outweighs that of the defendant publishers, many of which are relatively small, family-owned businesses.[7]

The public and quasi-public bodies here are not suing in their governmental capacity, but in their proprietary capacity—that is, as entities allegedly wronged when they entered the market place to purchase goods needed for their operations. In *Georgia* v. *Evans,* 316 U. S. 159 (1942), this Court specifically held that a state was a "person" allowed to maintain a treble damage action because the state (unlike the United States) has no other rights or powers under the antitrust laws. This Court reasoned that since a state does not have the power of a governmental unit in the antitrust area, it should be given the *same* rights as a *private party* to recover antitrust

[7] For instance, the complaints alleged that recent, annual national sales of library editions of children's books by the defendant publishers ranged from a low of $100,000 to no more than $5,000,000, with sixteen of the eighteen publishers having sales of $2,000,000 or less.

damages sustained when it enters the market. The rationale of *Georgia* v. *Evans* defeats appellants' attempts to distinguish their situation from that of private parties.

4. The federal money argument.

Equally ineffectual is appellants' contention that the proviso to Section 5(a) should be ignored because federal money, in part, has been used to purchase books.

In the first place, that is a policy argument which is more appropriately addressed to the Congress. Moreover, it is the Department of Justice which is responsible for enforcement of the rights of the United States under Section 4A of the Clayton Act, 15 U.S.C. § 15a, by instituting suits for injury to its "business or property." And the Department of Justice has balanced this factor and the needs of the public generally and then decided to exercise its responsibility by approving these consent judgments as they stand.

In sum, appellants' only reason for advocating that the judgments below be upset is a self-serving desire that their private claims be litigated not by themselves but by the United States Government. This desire cannot override the Government's decision to proceed in accordance with the clear and unqualified congressional policy expressed in Section 5(a) and thereby secure the obvious benefit contemplated by the proviso. Appellants' quarrel with the Government's decision to utilize that policy presents no substantial question for review by this Court.

III.

Appellants have no interest in these actions to justify intervention.

As already noted, appellants' essential and only purpose in seeking intervention is to obtain assistance in their respective private treble damage actions.[8] This is plainly not an "interest" that justifies intervention. Rule 24, Fed. R. Civ. P.

This Court has emphatically held that an outsider's request for individual *injunctive* relief cannot preclude entry of a consent judgment in an action under Section 4 of the Sherman Act brought by the Justice Department and that accordingly the outsider has no interest which can justify intervention in such an action. *Sam Fox Publishing Co.* v. *United States*, 366 U. S. 683 (1961). There, this Court said:

> "We regard it as fully settled that a person whose private interests coincide with the public interest in government antitrust litigation is nonetheless not bound by the eventuality of such litigation, and hence may not, as of right, intervene in it. * * * '" * * * [T]he scheme of the statute is sharply to distinguish between Government suits, either criminal or civil, and private suits for injunctive relief or for treble damages. Different policy considerations govern each of these. They may proceed simultaneously or in disregard of each other.'" *Id.* at 347 U. S. 518-519.

[8] The School District of Philadelphia and City of Philadelphia, appellants in No. 1146, commenced their action for treble damages and injunctive relief on June 24, 1966—*ten months prior* to the filing of the Government cases on April 18, 1967. *School District of Philadelphia et al.* v. *Harper & Row Publishers, Inc. et al.*, Civil Action No. 40,537 (E.D. Pa.).

> "This principle is certainly broad enough to make it clear that just as the Government is not bound by private antitrust litigation to which it is a stranger, so private parties, similarly situated, are not bound by government litigation. * * * Indeed § 5 of the Clayton Act (15 USC § 16), making an adjudication of liability in a government antitrust suit prima facie evidence of liability in a § 4 private suit, would seem to be a definitive legislative pronouncement that a government suit cannot be preclusive of private litigation, even though relating to the same subject matter.
>
> "Regarding appellants' position in the case from this aspect, we conclude that they were not entitled to intervene as of right." * * *" (336 U. S. at 689-690.)

Appellants contend that the *Sam Fox* rationale was changed by this Court's decision in *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U. S. 129 (1967) and the recent amendment of Rule 24, Fed. R. Civ. P. But *Cascade* stands on its own peculiar facts. The intervenors there were *not* seeking assistance for a private antitrust suit, as are appellants here. Rather the intervenors there were seeking to have this Court's earlier mandate of divestiture made effective—relief not practically obtainable in any separate action the intervenors could commence.

That the *Cascade* rule is specifically so limited has been demonstrated by subsequent decisions. After the *Cascade* case and the 1966 amendment of Rule 24, this Court has twice summarily affirmed judgments denying intervention in Government antitrust actions. The first of these was *United States* v. *Aluminum Co. of America*, 41 F.R.D. 342 (E.D. Mo.), *aff'd sub nom. Lupton Mfg. Co.* v. *United States*, 388 U. S. 457 (1967), where the district court had stated:

> "There is considerable authority to support the view that no one other than the government should be permitted in this law suit at this time and none to support intervention." (At p. 344.)

The second was *United States* v. *Blue Chip Stamp Co.*, 272 F. Supp. 432 (C.D. Cal. 1967), *aff'd sub nom. Thrifty Shoppers Scrip Co.* v. *United States*, 389 U.S. 580 (1968), where the district court refused to permit intervention by outsiders dissatisfied with the substantive terms of a consent judgment. The district court specifically held that the would-be intervenors had no "interest" to support intervention (272 F. Supp. at p. 438):

> "Petitioners have not demonstrated the existence of any 'interest relating to the property or transaction' which is the subject of the Government's suit which might support their application to intervene."

Noting that the applicants for intervention, there as here, were plaintiffs or prospective plaintiffs in pending private actions under the antitrust laws, the district court went on to say (*ibid.*):

> "None of their 'interests' are in any way 'impaired or impeded' by settlement of the Government's case. Nor is their ability to prosecute their respective cases impaired or impeded by the Government's case. The speculation that petitioners may be benefited in the trial of their respective cases if the Government is forced to litigate its case certainly does not give them an 'interest' in the Government's case sufficient to support the motions to intervene."

This holding applies here with even greater force, since here the would-be intervenors' only real quarrel with these consent judgments is that they contain no admissions of liability.

Because of the strength and recency of the *Blue Chip* case, appellants have attempted to distinguish it in a number of ways. Appellants in No. 1146 erroneously state (at p. 18 n. 7) that the *Blue Chip* case is distinguishable because there "The consent decree had been the subject of prolonged negotiations and modifications." In light of the history of these cases (see Statement *supra*) it can hardly be argued that the judgments here were not the result of "prolonged negotiations and modifications."

Appellants also rely on the fact that the prospective intervenors' motions in *Blue Chip* were not made before the entry of the consent decree. But this attempted distinction ignores the fact that the would-be intervenors in *Blue Chip* were fully heard as *amici curiae* in the district court before entry of the challenged decree.[9] The attempted distinction also ignores the lengthy and explicit discussion by the district court in *Blue Chip* concerning factors other than timeliness bearing on the right to intervene in antitrust cases. The district court clearly indicated that the proposed intervenors' applications would have been denied whether or not they had been timely made. (272 F. Supp. at 438, 440.) Thus, there is no warrant for the inference, urged by the appellants here, that this Court's summary affirmance of the denial of intervention motions in *Blue Chip* was grounded solely on the technicality that the formal motions to intervene were not made until after the decree had been entered.

Finally, appellants argue at length that the court below abused its discretion in denying permissive intervention under Rule 24(b) of the Federal Rules of Civil Procedure. This argument is specious. As we have pointed out above,

[9] Motion of United States to Affirm, Nos. 820 and 849, Oct. Term 1967, pp. 3-4.

the district court allowed appellants all of the practical benefits of intervention, and it so indicated (Transcript of Hearing, Nov. 16, 1967, p. 61). Appellants submitted briefs to the court and made extensive oral arguments on two occasions. One of their last minute demands resulted in a modification of the decrees.[10] Regardless of their formal status, appellants were fully heard.

Thus appellants' plaint is actually reduced to the district court's refusal to satisfy their desire to have the consent judgments contain admissions of liability. This contention, as we have demonstrated and as the district court ruled, is without merit.

[10] Appellants obtained additional relief in that information submitted to the grand jury was impounded. See the recital in the court's order denying intervention (Jurisdictional Statement in No. 1141, p. 3b) and order entered November 20, 1967.

CONCLUSION

The order of the district court denying appellants' motions to intervene should be affirmed.

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SUPREME COURT, U. S.

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Nos. 1141 and 1146

In the Supreme Court of the United States

OCTOBER TERM, 1967

CITY OF NEW YORK, ET AL.

v.

UNITED STATES OF AMERICA, ET AL.

SCHOOL DISTRICT OF PHILADELPHIA, ET AL.

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

MOTION TO AFFIRM

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UNITED STATES OF AMERICA, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States moves that the order of the district court be affirmed.

STATEMENT

These are direct appeals from an order of the district court (J.S. No. 1141, App. B) denying appellants' motions to intervene in opposition to final consent judgments (J.S. No. 1141, App. C) entered in

antitrust actions brought by the United States against publishers of children's books.

1. After lengthy investigation,[1] the United States, on April 18, 1967, filed in the District Court for the Northern District of Illinois 18 separate civil suits, each charging that the defendant publisher and numerous wholesalers to whom it sold had conspired to "fix, maintain, and stabilize" the wholesalers' resale prices on library editions[2] of children's books, in violation of Section 1 of the Sherman Act, 15 U.S.C. 1 (J.S. No. 1141, App. A). In addition to seeking general injunctive relief, the complaints sought prohibitions upon a variety of specific practices, including the use of such phrases as "net price," which suggest resale prices (*id.*, Prayer (C)(1), (2)); and refusals to sell to, delays or misdirection of orders from, or discrimination against any purchaser, because of the resale price of the books purchased (*id.*, Prayer (C)(3), (4)).

Negotiations over possible consent judgments began soon thereafter. On October 23, 1967, a proposed consent judgment was filed in each case with a stipulation that the judgment could be entered after 30 days unless the government withdrew its consent in the interval (J.S. No. 1146, p. A6).

[1] A six-month grand jury investigation gave rise to the evidence on which these cases were based. The Department of Justice concluded, however, that the evidence would not justify a criminal prosecution.

[2] Children's books having a stronger binding than the ordinary or "trade" editions are called "library" editions, and are especially designed for school and library purchasers.

The substantive provisions of the judgments were identical. There were general, permanent injunctions against price-fixing, collusive bidding, and other unlawful pricing practices with respect to the sale of any books to any persons (J.S., No. 1141, p. 6c, ¶ VII). Other provisions permanently forbade a variety of practices by which the publishers might influence the prices at which wholesalers resell books to schools, libraries and governmental agencies. There were prohibitions against restricting or limiting the school and library customers to whom wholesalers may sell (*id.*, p. 4c, ¶ VI (A)); policing or suggesting prices (other than by imprinting a price without more on the book jacket) at which wholesalers resell books to such customers (*id.*, ¶ VI (B)); and cutting off or refusing to deal with any wholesaler because of the resale price charged any such customer (*id.*, ¶ VI (C) (D)). These latter provisions also prohibited, for five years, any activity directed toward lawful resale-price maintenance (*id.*, ¶ VI Proviso). The decrees further required that promotional material and catalogues which are sent to wholesalers and contain the publishers' school and library prices must contain a statement that the wholesaler is free to charge whatever prices he wishes for the defendants' books (*id.*, ¶ VI (F)).

Each defendant was to be directed, for a period of five years, to mail copies of the decree to wholesalers with whom it dealt and within six months to give notice of the decree to schools, libraries and government agencies to whom it mails catalogues (*id.*, ¶ IV). Each also was to be enjoined for five years from using the

term "net price" in connection with all books other than textbooks [3] (*id.*, p. 4c, ¶ V). Over the same period, the publishers were to furnish with all bids over $100 a written certification that the bid was not the result of any agreement, understanding, plan, or program between the publisher and any other person (*id.*, p. 7c, ¶ IX).

2. Appellants are various States, municipalities, and local school boards. Prior to the filing of the proposed consent decrees, several appellants had instituted treble-damage actions against the publishers, alleging that overcharges had resulted from violations of the Sherman Act.[4] Several of their counsel asked the Department of Justice to insist upon a so-called "Asphalt" clause [5] in any consent decree—*i.e.*, an admission of violation of Section 1 of the Sherman Act that could be used under Section 5(a) of the Clayton Act as *prima facie* evidence in the treble-damage actions. The publishers, however, made clear to the government that they would not consent to such a provision (Tr. Nov. 13, 1967, p. 60).

After the proposed decrees were filed, appellants [6]

[3] Textbooks generally are not sold through wholesalers.

[4] The treble-damage actions charge price-fixing among the publishers as well as the publisher-wholesaler conspiracies alleged in the government cases.

[5] The clause takes its name from one of the three related cases where it was used, *United States* v. *The Lake Asphalt and Petroleum Company*, 1960 Trade Cases ¶ 69,835. See, also, *United States* v. *Bituminous Concrete Association, Inc.*, 1960 Trade Cases ¶ 69,878; *United States* v. *Allied Chemical Corp.*, 1961 Trade Cases ¶ 69,923.

[6] Two parties who have not appealed also sought and were denied leave to intervene below. Their contentions were the same as appellants'.

sought intervention as of right under Rule 24(a) of the Federal Rules of Civil Procedure, or, alternatively, discretionary intervention under Rule 24(b). They argued that no decree should be entered unless it contained an "Asphalt" clause. Some of them also demanded a summary of, and access to, evidence the government had collected during its investigations. At a hearing held on November 13, 1967, on the intervention petitions, appellants sought four additional items of relief: (1) the decrees should require the defendants to publish children's books in trade editions or in loose leaf form for subsequent binding ("prebinder sheets"), as well as in library editions; (2) the decrees should deal with, as by some form of compulsory licensing, alleged "abuse of * * * copyrights"; (3) text books should not be exempted from the prohibition of the use of the terms "net" or "net price"; and (4) the visitation provisions allowing the government future access to the publishers' records and employees for the purpose of investigating compliance with the decrees should be amended to make any information thereby obtained available to appellants. (Tr. Nov. 13, 1967, pp. 127–128; 129–130; 130–131; 144–146).

3. The court allowed appellants to participate fully as *amici curiae*. It took under advisement the argument that the decrees should contain "Asphalt" clauses, and ordered the parties and appellants to negotiate on the other points. Following such negotiations, appellants, on November 16, withdrew their proposals relating to the alleged "abuse of copyright" and the use of the term "net" in textbook pricing (Tr. Nov.

16, 1967, pp. 11–13). The decrees were modified to provide that any evidence of a violation of the decrees obtained during visitation and "which adversely affects the interest of any State or local governmental agency or instrumentality" would be impounded for a period of one year and would be released to any State or local governmental agency upon a showing of good cause (Tr. Nov. 16, 1967, 68–69; J.S. No. 1141, p. 8c ¶ X).

Neither the United States nor any of the *amici* was able to show that any absence of trade editions or prebinder sheets resulted from or was connected in any way to unlawful conduct. Consequently the court rejected appellants' request that publication of such editions be required, noting that the retention of jurisdiction in the decrees would allow remedial action upon any subsequent showing of noncompetitive curtailment of production and sale of trade editions (Tr. Nov. 16, 1967, pp. 62–64).

On November 20, the court impounded all documents, grand jury subpoenas and transcripts of grand jury testimony in the possession of the Department of Justice,[7] and directed their retention until further order of the Chief Judge of the United States District Court for the Northern District of Illinois. There are pending before him appellants' petitions for release of the documents to them.

On November 27 the court approved and entered the modified consent judgments, and denied inter-

[7] The text of the order is printed in the Appendix to this motion (pp. 16–17, *infra*).

vention. Noting that appellants had been "fully heard as amici curiae," the court held that they had not established any right to intervention under Rule 24(a)(2), and that discretionary intervention under Rule 24(b) would unduly delay and prejudice adjudication of the rights of the parties.

ARGUMENT

1. Appellants sought intervention in this litigation and opposed the consent judgments not because they had any serious objection to the adequacy of such judgments to provide effective relief against the alleged unlawful practices,[8] but because they insisted that this litigation should not be terminated unless the defendants made some concession of violation which appellants could use in their private treble damage suits. They sought such intervention under Rule 24(a)(2) of the Federal Rules of Civil Procedure, which gives a right to intervene

> when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical

[8] At most, one of the five additional items of substantive relief which the appellants sought (see *supra*, p. 5) is still in dispute: a requirement that the defendants publish trade editions and pre-binder sheets. Neither appeal refers to this issue in the "Questions Presented," but appellants in No. 1141 refer to it in passing (J.S. No. 1141, p. 6; n. 5a, p. 8; p. 16, 25). There cannot be any serious question, however, about the propriety of the district court's refusal to insist upon a clause for which, as noted (p. 6, *supra*), no one was able to show any need and which can be added if changed conditions make it appropriate.

> matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Appellant's basic argument is that since Section 5(a) of the Clayton Act permits the use in a private antitrust suit of an adjudication of violation in a government antitrust suit as *prima facie* evidence of such violation,[9] any disposition of the government litigation that does not provide them with a similar benefit will "impair or impede" their ability to prosecute their own cases.

Obviously, either the inclusion of "Asphalt" clauses in the consent judgments or the successful trial of the government's suits, resulting in adjudications of violation, would aid the appellants in prosecuting their treble damage actions. But it does not follow that a settlement of the government cases that denies the appellants such benefits "impair[s] or impede[s]" their ability effectively to prosecute their own actions within the meaning of Rule 24(a)(2). On the contrary, where the interest sought to be protected through intervention is the successful prosecution of

[9] Section 5a provides in relevant part:

> A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws * * * as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided*, That this section shall not apply to consent judgments or decrees entered before any testimony has been taken * * *.

another suit, we submit that the thrust of the Rule is to guarantee participation only where the disposition of the action may have some direct, affirmatively detrimental impact upon the conduct of the other suit. The lack of such collateral benefits as would flow to a third party if the suit in which intervention is sought were successfully litigated rather than settled do not constitute the kind of impairment or impediment the Rule is designed to avoid. Cf. *United States* v. *Blue Chip Stamp Co.*, 272 F. Supp. 432, 438 (C.D. Calif.), affirmed *sub nom. Thrifty Shoppers Scrip Co.* v. *United States*, 389 U.S. 580.

This distinction is illustrated by comparing the present case with *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129. In *El Paso*, Cascade, a purchaser of natural gas from a pipeline company that El Paso had illegally acquired in violation of Section 7 of the Clayton Act, was held to have standing under Rule 24(a)(2) to intervene to oppose a consent judgment for the divestiture of the pipeline company. Cascade contended that the terms upon which divestiture was proposed would not provide the divested company with adequate gas reserves and would impose unjustifiable conditions upon its operations, to Cascade's economic detriment as a customer. Although Cascade could have filed its own Section 7 suit seeking further divestiture, the consent decree necessarily would have determined with finality the character of the divested company, and it would have been virtually impossible as a practical matter for another court subsequently to alter substantially the form of divestiture.

In the present case, on the other hand, nothing in the consent judgments as a practical matter prevents the appellants from obtaining the full measure of the relief they are seeking in their private suits. If they can prove violations by the defendants and establish their injury therefrom, they are entitled to recover; and their position in this respect is no worse now than it was either before the consent judgments were entered or before the government suits were filed. The full scope of pre-trial discovery is available to them. Indeed, the appellants on their pending applications may be given access to the evidence obtained by the government in its investigation of these cases—a benefit that may be just as important as the use of any adjudication of violation. Cf. *Minnesota Mining & Manufacturing Co.* v. *New Jersey Wood Finishing Co.*, 381 U.S. 311, 319.

2. Our conclusion that the settlement of a government antitrust suit without an "Asphalt" clause does not have the kind of impact upon the ability of private treble damage plaintiffs to litigate their cases that would entitle them to intervene under Rule 24(a)(2) is confirmed by two interrelated public policy considerations: the basic design of Section 5 of the Clayton Act, and the seriously adverse impact upon the enforcement of the antitrust laws by the Department of Justice that would result from acceptance of appellants' argument.

Although Section 5 generally provides that a final adjudication of violation in a government antitrust suit shall be *prima facie* evidence thereof in any pri-

vate suit brought against the same defendant, a proviso makes that provision inapplicable "to consent judgments or decrees entered before any testimony has been taken * * *." Congress has made clear that the purpose of the proviso is to encourage defendants to settle government actions before trial. See S. Doc. 584, 63d Cong., 2d Sess., p. 6; 51 Cong. Rec. 15638, 15825, 16276. Congress thus made the judgment that it was in the public interest to deny private treble damage litigants the benefits of the effect of an adjudication in government litigation in order to achieve settlement of such litigation without the delay and uncertainties that necessarily accompany a trial on the merits.

This judgment reflects the practical realities of government antitrust enforcement. Resources simply are not available to investigate and prosecute to completion every possible antitrust violation. Terminating cases through consent decrees that provide effective relief enables the government to employ its limited personnel and facilities more effectively.[10] In addition, where such a consent decree can be obtained, the government's prime objective—a change in the

[10] A member of the congressional conference committee that drafted the proviso of Section 5(a) stated:

> * * * One attorney and a stenographer settled the celebrated New Haven case, whereas if we had given this *prima facie* effect to that judgment the Government would have been fighting now, and possibly for years, and it would have cost the Government millions of dollars to bring them to their knees, for they would not have "consented" to such a judgment. * * * [51 Cong. Rec. 16276 (1914), Remarks of Representative Webb].

defendant's business practices—is accomplished and the public obtains the benefits thereof sooner than it would if the case were litigated. Finally, a consent judgment guarantees definite relief, as opposed to the uncertainty of outcome that exists whenever a case goes to trial.

These benefits of consent decrees are not simply theoretical. During recent years, more than 70 percent of the antitrust injunctive suits brought by the Department of Justice have been terminated by consent judgments.[11] The Department's experience has been that rather than accept a consent decree containing an "Asphalt" clause, defendants will go to trial. Requiring the government to try every case where the defendants reject an asphalt clause—and the government's experience indicates that this would be virtually all cases—would severely reduce the number of cases the Department could bring; and this would be so even if the government were to insist on "Asphalt" clauses only in "price fixing" cases where public agencies have been injured.[12]

[11] See Report of the Antitrust Subcommittee No. 5, House Committee on the Judiciary, 86th Cong., 1st Sess., *On Consent Decree Program of the Department of Justice*, pp. 7–10; Hearings on S. 2512 Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 89th Cong., 2d Sess, pp. 86–87.

[12] Appellants contend (J.S. No. 1141, p. 12) that the settlement of government civil antitrust price-fixing suits through consent judgments not containing an "Asphalt" clause means that "price-fixing apparently involves only acceptable businessman's risks"; and that the effectiveness of treble damage suits as a deterrent to violation of the antitrust laws is seriously weakened. This argument ignores the fact that the possibility of criminal prosecution is no less effective a deterrant than treble

Moreover, it is difficult to see any basis upon which courts validily could distinguish between price-fixing and other *per se* offenses, or between cases in which the private plaintiffs seeking to block settlement of the government suit were public bodies rather than private persons. For if the arguments that appellants make to justify denying the government the right to settle a case on a basis that provides all the relief it seeks are valid here, they would seem equally valid in those other situations. Thus, the inevitable practical result of accepting appellants' argument would be to prevent the government from using consent decrees in a large, if not the major, portion of its civil cases—with a concomitant reduction in government antitrust enforcement.[13]

3. In the present cases the consent judgments fully terminated all the defendants' alleged illegal business practices as demanded by the government, and provided adequate relief against their repetition. The district court permitted the appellants to present their

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damage liability. (In the present case, as noted *supra*, p. 2, n. 1, a grand jury investigated the defendants' practices, but the government concluded that the evidence did not warrant a criminal proceeding.) Moreover, there have been many successful treble damage suits resulting in large recoveries even where no government suit was brought, so that there is no reason to believe that the fact that some government suits are terminated without an adjudication or an "Asphalt" clause significantly diminishes the deterrent effect of such private litigation.

[13] The time that would be necessary to try the present cases and the resulting delay in the provision of any relief justify the district court's conclusion (J.S. No. 1141, p. 4b) that permissive intervention under Rule 24(b) "would unduly delay and prejudice the adjudication of the rights of plaintiff and the defendants * * *."

objections to the decrees fully as *amici*. The settlement of these cases completely accomplished the government's objective in filing the suits, and did so without the uncertainty, delay and expense that would have resulted had the cases been tried. Congress has struck the balance in Section 5 of the Clayton Act that in such circumstances the desirability of a prompt settlement outweighs any failure to provide a further benefit to the private plaintiffs. The district court did not abuse its discretion in entering the judgments rather than forcing the government to go to trial.

CONCLUSION

The order of the district court denying appellants' motions to intervene should be affirmed.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

DONALD F. TURNER,
Assistant Attorney General.

SEYMOUR H. DUSSMAN,
Attorney.

APRIL 1968.

APPENDIX

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

Eastern Division

UNITED STATES OF AMERICA, PLAINTIFF

v.

HARPER & ROW, PUBLISHERS, INC., AND RELATED CASES, DEFENDANTS

Civil Action No. 67 C 612 Through 67 C 629

Entered November 20, 1967

Order Impounding Documents

The United States of America, plaintiff herein, having made an investigation which resulted in the filing of the eighteen captioned civil injunctive cases; and it appearing that numerous treble damage actions based in large part on the same facts as alleged in these civil injunctive actions have been and may be filed in various United States District Courts by States, municipalities, school districts and other purchasers of children's books; that motions have been or may be made in these treble damage actions for the production of documents, grand jury subpoenas, and grand jury testimony presently in the possession of plaintiff; and that it is in the public interest that these documents, grand jury subpoenas, and grand jury testimony be identifiable and preserved and remain together for possible use in these treble damage actions.

IT IS ORDERED, ADJUDGED AND DECREED that all documents procured by process or otherwise by the plaintiff from any individual, partnership, firm, or corporation during its investigation of trade and commerce in the sale of children's books, all grand jury subpoenas, and all grand jury transcripts of testimony but not internal memoranda or work product of plaintiff have been impounded in the custody of John E. Sarbaugh, Chief of the Midwest Office of the Antitrust Division, and shall be retained in his possession, control, and custody on the 26th floor of the United States Courthouse, 219 South Dearborn Street, Chicago, Illinois, until further order of the Chief Judge of the United States District Court for the Northern District of Illinois.

It is further ordered that each owner of the documents described herein shall be permitted access to his documents for inspection and copying without futher order.

Entered:

A. L. MAROVITZ,
United States District Judge.

NOVEMBER 20, 1967.

U.S. GOVERNMENT PRINTING OFFICE: 1968

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

CITY OF NEW YORK ET AL. *v.* UNITED STATES ET AL.; and

SCHOOL DISTRICT OF PHILADELPHIA ET AL. *v.* UNITED STATES ET AL.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

Nos. 1141 and 1146. Decided April 22, 1968.

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.

MR. JUSTICE BLACK would note probable jurisdiction and set the case for oral argument.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of these cases.